Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT C. BLACK,

Petitioner,

v.

DELTA AIR LINES, INC. and AL PEREZ,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (the "ADA"), preempts state common law claims for breach of contract, negligent misrepresentation, and fraud against an airline and a gate supervisor for failing to honor confirmed first-class reservations on a flight and for representations made in relation to those reservations.

2. Whether the Department of Transportation ("DOT") regulations regarding oversales and notice of incorporated terms, 14 C.F.R. §§ 250.1-.11 and 253, which apply to airline contracts of carriage, require preemption of state common law claims for breach of contract, negligent misrepresentation, and fraud under the ADA.

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OPINIONS BELOW

The opinion of the Supreme Court of Texas (App. 1-26) is reported at 116 S.W.3d 745 (Tex. 2003). The opinion of the Tenth Court of Appeals of Texas (App. 30-53), was originally unpublished, but the Supreme Court of Texas ordered it published and the court of appeals' opinion appears at 2002 WL 32156264 (Tex. App. – Waco 2002). The district court issued no opinion and district court judgment (App. 54-56) is unreported.

JURISDICTION

The Supreme Court of Texas issued its judgment and opinion on June 26, 2003. On September 11, 2003, the Supreme Court of Texas granted Robert C. Black's timely filed motion for rehearing in part (App. 1-2), and a corrected judgment and opinion issued that day. (App. 3-26). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing

in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The relevant preemption provision of the ADA, 49 U.S.C. § 41713(b)(1) is reproduced at App. 57-58. The relevant regulations adopted by the Department of Transportation ("DOT") applicable to this case, 14 C.F.R. §§ 250.1-250.11, 253.1-253.8 (2002), are reprinted at App. 58-74.[1]

STATEMENT OF THE CASE

Robert C. Black ("Black") brought suit against Delta Air Lines, Inc. ("Delta") and a Delta supervisor, Al Perez ("Perez"), for damages for breach of contract, negligent misrepresentation, and fraud/intentional misrepresentation arising out of the failure to honor two confirmed first-class reservations for air travel and for the representations made regarding those tickets. On June 23, 1995, Black purchased two first-class tickets for Delta flight 661 leaving from Dallas/Fort Worth the afternoon of the 23rd

[1] On September 8, 2003, three days before the Texas supreme court issued its corrected judgment and opinion, the DOT promulgated certain revisions to Part 250 of the Code of Federal Regulations, specifically 14 C.F.R. §§ 250.1, 250.2, 250.2b, 250.5, and 250.9, to take effect October 8, 2003. 68 Fed. Reg. 52835 (Sept. 8, 2003). These revisions provided technical corrections to the regulations at issue, such as changing references from the former regulatory board to the DOT. Because only the 2002 regulations were brought to the state supreme court's attention by Delta and Perez (Pet. for Rev. at App. 5), Black reproduces those regulations in his Appendix.

and arriving in Las Vegas, Nevada at 3:55 p.m. with a return trip on June 25, 1995, from a Dallas travel agency. Black bought the tickets so that he and his wife, Mary, could have a romantic weekend together to repair his damaged marriage. Black planned the surprise trip as well as several activities, including a leisurely dinner and attending a Tom Jones concert the evening of their arrival.

The invoices for the tickets Black received from the travel agency reflected two first-class reservations on flight 661 and the return flight. Although the invoices showed seat assignments for Black for both directions, the invoice for Mary Black's ticket reflected a seat assignment only for the return flight. The invoice for Mary Black's ticket reflected first-class reservations for both directions. Each ticket purchased by Black indicated that they were "Issued by DELTA AIRLINES INC" and reflected first-class travel for the Blacks on flight 661 and the return flight.

After receiving the tickets, Black departed for the airport, fully expecting that both he and his wife would fly first class together as planned. At no time prior to his arrival at the airport, did anyone at Delta or the travel agency ever inform him there was any problem with the reservations or the two first-class seats that he had purchased were incorrect in any way. In fact, the travel agent and manager of the travel agency specifically represented to Black that he had two confirmed first-class tickets.

When Black arrived at the gate, Black requested adjacent seats in first class, and the gate agent responded "I'll see what I can do." While in the process of boarding, Perez, a Delta gate supervisor, appeared and informed

Black that he did not have two confirmed first class seats for the flight. According to Delta, Delta had a confirmed first-class seat for Black, but only a confirmed coach seat for Black's wife, who Delta placed on a priority waiting list for first class. Perez and the travel agent spoke on the telephone, and the travel agent insisted that Black had two confirmed first-class tickets.

Delta and the airline industry routinely encounter the situation at issue in this case. Passengers, in many cases, show up for flights with confirmed tickets but no reservations. Further, Delta's reservations system commonly failed to confirm a reservation for a passenger under a rival reservations system that the travel agency used in this case.

In response to the Blacks' plight, Delta offered Black some options: the Blacks could sit together in coach for the flight; they could fly separately on the flight; or they could fly first class on a later flight. Each of the alternatives claimed by Delta included free travel vouchers for coach seats. Because the alternatives were unacceptable given the purpose of the trip and the schedule, Black rejected Delta's proposals and made other flight arrangements, specifically, he hired a private air carrier to transport him and wife to Las Vegas.

Thereafter, Black sued Delta for breach of contract and sued both Delta and Perez for intentional misrepresentation and negligent misrepresentation. Delta and Perez moved for summary judgment on several grounds, including preemption under the ADA. (App. 7-8, 33). The trial court entered a take nothing summary judgment in favor of Delta and Perez. (App. 54-56). Black appealed.

The state court of appeals reversed the trial court judgment and remanded the case for trial. (App. 30, 51). After undertaking considered analysis of the statute, case law, and federal regulations, the court of appeals held that the ADA did not preempt Black's claims against Delta for breach of contract, (App. 35-43), or his claims against Delta and Perez for fraud and negligent misrepresentation. (App. 44-46).

Delta and Perez petitioned the Texas supreme court for review of a single issue – preemption. (App. 8). After reviewing the statutory framework of the ADA, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), and certain DOT regulations, the court held that the ADA expressly preempted all of Black's claims against Delta and Perez, (App. 25-26), and left Black with no remedy whatsoever against the airline.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

This case raises important, recurring questions relating to the preemptive scope of the ADA on state common law claims, the meaning of the words "related to," "service," and "enact or enforce a law" under the ADA, as well as the proper application of *Wolens*, *Morales*, and the relevant DOT regulations. This case directly impacts the boundaries of federalism and states' rights. It cries out for review by this Court to safeguard the rights of the traveling public to bring state law claims against the airlines for their conduct and the agreements they undertake. Action by this Court, it is hoped, will halt the ever-growing abuse

of the ADA as a means of achieving sweeping immunity for the airlines – a result unintended by Congress and contrary to the purposes behind the ADA. Among other things, the Texas supreme court's holding that the ADA preempts a routine breach of contract claim brought by a passenger flies in the face of *Wolens* and does violence to the deregulatory purpose behind the ADA for the airline industry to "maximize reliance on competitive market forces." *Morales*, 504 U.S. at 378. Deregulation should triumph, not the economic protectionism artificially created by courts such as the Texas supreme court with its overly expansive interpretation of the ADA.

In the wake of *Morales* and *Wolens*, lower courts' application of ADA preemption has been turbulent and contradictory. The legal principles at stake in this case have ramifications for a wide variety of tort and contract claims against the airlines, and review by this Court would bring much needed guidance, certainty, and tranquility to this area of the law. For the reasons that follow, the Court should grant certiorari review.

I. The Supreme Court of Texas Ignored the Fundamental Purpose of the ADA and Held, Contrary to *American Airlines, Inc. v. Wolens*, that the ADA Preempts a Routine Breach of Contract Claim by a Passenger Against an Airline.

Unfortunately, the state supreme court ruled, contrary to *Wolens*, that the ADA preempts a breach of contract claim against an airline. (App. 22-25). In reaching this erroneous conclusion, the supreme court's holding directly contradicts *Wolens* and the cogent analysis of that case. This case comes within the ambit of *Wolens*. The "terms and conditions airlines offer and passengers accept" are

"privately ordered obligations" not amounting to a State's "enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law" within the meaning of the ADA. *Wolens*, 513 U.S. at 228-29; *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 (1992). *Wolens* should not be read so strictly, as the supreme court of Texas did, that only "some of" the terms and conditions airlines offer and passengers accept are privately ordered obligations not preempted by the ADA. (App. 12-13).

Further, the court below overlooked a key passage from *Wolens* where this Court explicitly stated that the "FAA's text, we note, presupposes the vitality of contracts governing transportation by air carriers." *Wolens*, 513 U.S. at 230. The presence of federal regulations in a contract of carriage poses no bar to the adjudication of a breach of contract claim:

> Section 411(b) [of the Federal Aviation Act] thus authorizes airlines to "incorporate by reference in any ticket or other written instrument any of the terms of the contract of carriage" to the extent authorized by the DOT. And the DOT's regulations contemplate that, upon the January 1, 1983, termination of domestic tariffs, "ticket contracts" ordinarily would be enforceable under "the contract law of the States." 47 Fed. Reg. 52129 (1982). Correspondingly, the DOT requires carriers to give passengers written notice of the time period within which they may "bring an action against the carrier for its acts." 14 C.F.R. § 253.5(b)(2) (1994).

Id. Thus, the presence of federal regulations weakens the conclusion reached by the state court that Black's breach of contract claims are preempted by the ADA. Nor can it be

said that Black's claims impermissibly raise the spectre of intrusive regulation. (App. 20).[2]

The court overstated its concerns that Black's claims have any potential for intrusive regulation of airline business practices. This Court recognized in *Wolens*, the essence of contract law is that this body of law is not "diverse, nonuniform, and confusing." *Id.* at 233. This Court found no large risk of nonuniform adjudication of a state court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide. *Id.* at 233, n.5.

Although Black believes the result unintentional, in reality, the net effect of the state supreme court's adverse decision will be to undermine Congress' intent behind the

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[2] In *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), the Seventh Circuit, after thoughtful analysis, explicitly rejected the argument that federal regulations are "external to the parties agreement":

> [The airline] argues that the contract claims in *Wolens* were based on American Airlines' unregulated frequent flyer program, while the contract claims here are based on [the airline]'s heavily regulated "bumping" practices. [The airline] asks us to read "privately ordered obligations" as encompassing only those obligations outside the purview of federal regulation of rates, routes, or services. Yet *Wolens* did not distinguish between various types of contracts; the Court limited its analysis to the question of whether a state's enforcement of private contracts amounted to an "enactment or enforcement of any law." *Id.* at 824. We see no reason to distinguish *Wolens* based on the mere existence of "bumping" regulations. *The question of whether a State has "enacted or enforced a law" cannot depend on the existence of federal regulations in the same area.*

73 F.3d at 1432 (italics added).

ADA preemption clause – that efficiency, low prices, variety, and quality would be furthered by reliance on competitive market forces rather than pervasive federal regulation. *See* H.R. Conf. Rep. No. 95-1779, 95th Cong., 2d Sess. 53 (1978). By refusing to permit Black's claims, particularly his breach of contract claim, to proceed in state court, the Texas supreme court has actually thwarted market forces and stymied efficiency. This Court, in considering the scope of ADA preemption, recognized:

> Market efficiency requires effective means to enforce private agreements. . . . "The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time." . . . That reality is key to sensible construction of the ADA.

Wolens, 513 U.S. at 230 (citations omitted). The Texas supreme court has not sensibly construed the ADA and has overlooked the reality that there must be a mechanism to enforce agreements by passengers against the airlines.

The basis of a contract action is the parties' agreement. *Id.* at 233. In this case, what Black and Delta agreed to – a contract of carriage – they bargained for against the backdrop of the DOT regulations as well as the common law. Black is seeking enforcement of the terms of his contract. Unlike the Consumer Fraud Act claims that this Court in *Wolens* found objectionable because the statutory claims did not simply give effect to bargains offered by the airlines and accepted by airline customers, *id.* at 228, Black is simply seeking to give effect to the bargain offered by the airlines and accepted by airline

customers like him, and the business judgments an airline made public about its ability to transport. *See id.* at 229.

Moreover, the Texas supreme court glossed over the ADA's savings clause, dismissing the savings provision as "a mere relic of the FAA" which does not supercede the specific substantive ADA preemption provision. (App. 10-11 n.2, citing *Morales*, 504 U.S. at 385). Far from being a throwback to a bygone era, this Court relied on the ADA's savings clause to find no preemption of routine breach of contract claims:

> The conclusion that the ADA permits state-law based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the FAA's saving clause, (preserving "the remedies now existing at common law or by statute"). The ADA's preemption clause, read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated.

Wolens, 513 U.S. at 232-33 (citations omitted). Reading the preemption provision with the savings clause gives effect to the savings provision and properly construes the statute.

In this case, to hold an airline to the terms of its contract of carriage, which allow Black to reject compensation and recover damages in state court, and to hold an airline to the representations made regarding that contract will not undo federal regulation. In fact, enforcing contracts such as Black's will promote the policy of ensuring that every air carrier achieves the smallest practicable

number of persons holding confirmed reservations is denied boarding involuntarily. 14 C.F.R. § 250.2a. Undoubtedly, the airlines would have an incentive to reduce the number of passengers denied boarding involuntarily to the lowest amount practicable, and reduce its litigation and other costs. Or, in fact, the airlines may "find it in their interest to develop new methods of controlling oversales to augment or supplant the procedures contained in [14 C.F.R. Part 250]," an effect that the former regulatory agency, the Civil Aeronautics Board (the "CAB" or "Board") has urged in the past. 43 Fed. Reg. 24277, 24279 (June 5, 1978); *see also id.* 24281-82.

II. This Court, Not the Supreme Court of Texas, Should Settle the Important Federal Issues of Whether the ADA Preempts State Common Law Claims for Fraud and Negligent Misrepresentation.

This Court has not yet decided whether the ADA preempts state common law claims for negligent misrepresentation and fraud. These are important federal issues concerning the scope of ADA preemption. The language and legislative history of the ADA do not manifest a clear congressional intent to preempt the vast majority of state law claims, including the commonly occurring claims of passengers that relate to airline negligence or fraud. *See* Daniel Rosenthal, *Note, Legal Turbulence: The Court's Misconstrual of the Airline Deregulation Act's Preemption Clause and the Effect on Passengers' Rights*, 51 Duke L.J. 1857, 1871 (2002). Not only are Black's claims not preempted under the *Wolens* exception to preemption, see discussion *supra* at § I, his other claims are not so distinct from breach of contract claims that they should be preempted under the ADA. Black's claims for negligent misrepresentation and fraud

are no more intrusive than the numerous personal injury claims found not to be preempted by the ADA. *See, e.g., Wolens*, 513 U.S. at 242-43 (O'Connor, J., concurring in part and dissenting in part) (citing numerous cases in which state tort claims found not preempted).[3]

The claims at issue here do not arise from overreaching guiding and policing of marketing practices of the airlines that this Court found offensive when applying state deceptive trade statutes. *See Wolens*, 513 U.S. at 228. Further, Black's claims are based on the conduct and undertakings of the airlines themselves. It is critical to note the DOT has neither the authority nor the apparatus needed to superintend contract disputes. *Id.* at 232. This

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[3] *See also Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996) (slander and defamation claims and other tort claims based on representations made by airline not preempted); *Lathigra v. British Airways PLC*, 41 F.3d 535, 540 (9th Cir. 1994) (looking to congressional intent, concluding the ADA did not preempt state tort actions for negligent reconfirmation against an airline because they did not undermine the goals of airline deregulation.); *West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994) (holding that claim for breach of duty of good faith and fair dealing and unjust discrimination in connection with airline reservation and refusal to board not preempted under the ADA); *Woodson v. U.S. Airways, Inc.*, 67 F. Supp. 2d 554 (M.D.N.C. 1999) (ADA does not preempt fraud, breach of contract and negligent supervision claims against airline); *Chukwu v. Board of Directors of Varig Airlines*, 880 F. Supp. 891 (D. Mass. 1995) (breach of contract claim for refusal to board airplane not preempted); *Sedigh v. Delta Airlines, Inc.*, 850 F. Supp. 197 (E.D.N.Y. 1994) (passenger's breach of contract claim for being forced off airline not preempted); *Bayne v. Adventure Tours USA, Inc.*, 841 F. Supp. 206 (N.D. Tex. 1994) (passenger's state law claim for breach of warranty not preempted); *Decker v. Browning-Ferris Industries of Colo., Inc.*, 931 P.2d 436 (Colo. 1997) (breach of express covenant of good faith and fair dealing is breach of an obligation created by contract and, therefore, not preempted).

reality applies with equal force to tort claims and cuts against preemption.

III. The Supreme Court of Texas Interpreted "Services" Under the Preemption Provision of the ADA, an Important Federal Question that has Divided the Courts of Appeals and Should be Settled by This Court Alone.

This case also warrants review because it presents an important issue, namely, the meaning of what constitutes an airline "service" under the ADA – an issue that has divided the courts of appeals. The Texas supreme court properly found that the ADA is silent on what activities qualify as airline services and recognized this Court has not determined that issue. (App. 16; *see also* App. 25). Because Congress failed to define "services" or specify what state action the ADA clause preempts, the courts were left to their own devices.

In the wake of this legislative silence, lower courts have adopted two directly divergent tests to determine whether a claim qualifies as a "service" under the ADA. The Ninth and Third Circuits have held that the term "service" encompasses the "prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail" but does not include " 'provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.' " *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1114-15 (9th Cir.), *cert. denied sub nom., Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000) (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.2d 1259 (9th Cir. 1998) (en banc), *op. amended on denial of reh'g*, 169 F.3d 594 (9th Cir. 1999)); *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186,

194 (3d Cir. 1998). This narrow definition espoused by these circuits was necessary to avoid preemption of virtually everything an airline does. *Duncan*, 208 F.3d at 1114. Other courts of appeal have adopted a more expansive approach and found the word "service" to include contractual features of air transportation, including ticketing, boarding procedures, provision of food and drink, and baggage handling. *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc). When applying the expansive approach of these circuits, preemption has predictably resulted.

Black contends that the Court should grant certiorari and resolve this important conflict among the circuits over the meaning of "service" under the ADA. In this regard, Black urges approval of the Ninth Circuit's approach. Black's claims involve an airline's dishonoring first-class tickets and the representations made in relation to those tickets. Black's claims do not directly assault Delta's pricing structure, airline schedules, or the routes Delta intends to fly. Only this Court can resolve the differing approaches among the circuits. Black respectfully urges the Court to intervene.

IV. The State Court Has Interpreted Federal Regulations Regarding Denied Boarding Compensation as Barring Common Law Claims Under State Law and Rendering Passengers Like Black Without a Remedy.

In reaching its conclusion finding preemption of all of Black's claims, the supreme court incorrectly claimed that

Black was seeking to improperly enlarge Delta's obligations to him. (App. 23). The court muddied its analysis and merged implied preemption theories into its express preemption analysis. (App. 20-22). By construing the regulations as it has, the supreme court has robbed Black, and other members of the flying public, of any remedy against the airline. This absurd result runs counter to the salutary legal maxim – "the law abhors a forfeiture." *See UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 360 (1999).

A. The Federal Regulations on Oversales, 14 C.F.R. §§ 250.1 through 250.11, Do Not Preempt Black's Claims.

Far from capable of being adjudicated only by reference to policies and laws external to its contract, Black's claims are fully able to be addressed under state contract and tort law, which continues as part of the remedies now existing at common law and fills in any contractual gaps. The court reasoned that the presence of the regulations modified Black's claims. In actuality, the analysis is the reverse – common law existed first, and the regulations are in derogation of that law. Further, the Texas supreme court failed to recognize that the federal regulations on oversales are *not comprehensive*. They simply reflect the *minimum* standards for treatment of passengers holding confirmed reservations due to an oversold flight. The Texas supreme court held the regulations were the maximum standards for treating passengers not accommodated on a flight. (App. 20-22). This result runs contrary to the agency interpretation of the Oversales regulations in the wake of ADA preemption. 47 Fed. Reg. 52980, 52980 (Nov. 24, 1982) (stating that 14 CFR Part 250 establishes

minimum standards for the treatment of airline passengers holding confirmed reservations who are not accommodated because their flight has been oversold.). The denied boarding compensation, a regulatory remedy, is only a minimum obligation of the airlines. It is not the exclusive remedy.[4]

B. 14 C.F.R. § 250.6 Does Not Bar Black's Claims.

The state supreme court's conclusion that 14 C.F.R. § 250.6 supports express preemption under the ADA (App. 22-23), if permitted to stand, produces another absurd result. It allows Delta to claim Black is not entitled to denied boarding compensation when Delta kept offering him denied boarding compensation, including other tickets. Instead of being ineligible for denied boarding compensation or being denied boarding under the regulations, Delta itself recognized that Black was entitled to

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[4] In fact, the CAB specifically rejected a proposal from the air carriers that the denied boarding compensation be an exclusive remedy to passengers:

> The Board specifically rejected the carriers' proposal that the denied boarding compensation be made an exclusive remedy:
>
> (T)o the extent that the proposed tariff provision is designed to restrict a passenger from seeking damages to which he would otherwise be entitled under the common law, we find it to be adverse to the public interest. Accordingly, we shall condition our approval of the agreement to make clear that the prescribed remedy is a *minimum* obligation of the carrier which, only if accepted by the passenger, would terminate the carrier's obligation.

Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 307 n.18 (1976).

such compensation. According to Perez, every alternative offered by Delta included travel vouchers (tickets). (I Clerk's R. 67.) Travel vouchers are specific denied boarding compensation permitted by 14 C.F.R. §§ 250.5(b) ("Carriers may offer free or reduced air transportation in lieu of the cash due under paragraph (a) of this section. . . . ") and 250.9(b) ("The airline may offer free tickets in place of the cash payment"). Black was permitted to refuse the compensation and seek recourse in a court of law. Delta is estopped to deny its own conduct repeatedly offering Black denied boarding compensation under § 250.5(b).

The CAB even recognized that the exceptions to denied boarding compensation, even if they did apply, *do not* preclude a passenger from taking action against the air carrier. In discussing subsection (d) to 14 C.F.R. § 250.6, then a new exception, the Board in 1982 stated:

> Carriers will not be required to make payments to passengers who can be accommodated on alternate flights that are scheduled to arrive at the passenger's next stopover or final destination within 1 hour of the scheduled arrival time of the original flight. . . . Passengers that can make their connecting flight or that are provided alternative flights that are scheduled to arrive within 1 hour of the original time will not be compensated. *Passengers will still, of course, be free in these situations to take action against carriers in situations where they feel it is justified.*

47 Fed. Reg. 52980, 52983 (Nov. 24, 1982) (italics added). The Board recognized that a passenger who is not entitled to denied boarding compensation can still take action against the carrier. The Board did not consider the exception to preempt the passenger's claims. Although the

subsection at issue is subsection (d), not (c), the same rationale applies to (c). If a passenger can still take action against the carrier even though he is denied compensation due to the application of subsection (d), then the same passenger surely can take action against the carrier in the face of subsection (c).

C. 14 C.F.R. § 250.9(b) Does Not Apply Only if a Passenger is Eligible for Denied Boarding Compensation.

Although the supreme court looked to a portion of 14 C.F.R. § 250.9(b) for guidance (App. 20-22), it did not consider critical language in the section and unnecessarily applied the section too restrictively. 14 C.F.R. § 250.9(b) provides that, among other things:

> COMPENSATION FOR DENIED BOARDING
>
> *If you have been denied a reserved seat on (name of air carrier), you are probably entitled to monetary compensation.* This notice explains the airline's obligation and the passenger's rights in the case of an oversold flight, in accordance with regulations of the U.S. Civil Aeronautics Board.[5]
>
> METHOD OF PAYMENT
>
> . . . . The air carrier may offer free tickets in place of the cash payment. *The passenger may, however, . . . refuse all compensation and bring private legal action.*

---

[5] *See* note 1 *supra*.

PASSENGER'S OPTIONS

> Acceptance of the compensation may relieve [the air carrier] from any further liability to the passenger caused by its failure to honor the confirmed reservation. *However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.*

14 C.F.R. § 250.9(b) (italics added).

The section clearly provides "*If you have been denied a reserved seat on (name of air carrier), you are probably entitled to monetary compensation.* This notice explains the airline's obligation and the passenger's rights in the case of an oversold flight, in accordance with regulations of the U.S. Civil Aeronautics Board." *Id.* The section does not state that it only applies in instances when a passenger is guaranteed denied boarding compensation.

This written explanation must be given to "anyone who requests it," not just persons denied boarding involuntarily. 14 C.F.R. § 250.9(a). The statement required by section 250.9(b) is not limited to only those persons entitled to the regulatory denied boarding compensation. If section 250.9(b) was intended only to cover persons who are eligible for denied boarding compensation, as the Texas supreme court has held, then surely the regulation would have so specified at the outset and not required the airlines to give the regulation to passengers "probably entitled to monetary compensation." *Id.* at § 250.9(b).

Further, the statement confirms the right to "seek to recover damages in a court of law," and does not restrict its benefits only to those persons entitled to denied boarding compensation under 14 C.F.R. § 250.5 and those not subject to the exceptions of 14 C.F.R. § 250.6. The notice

applies to the "passenger," not "the passenger who is eligible for denied boarding compensation under § 250.5 and who does not fall within an exception provided in § 250.6."

V. The State Court Decision Reflects an Overly Broad Application of ADA Preemption and This Court Should Step in to Provide Consumers Like Black With a Meaningful Remedy Against the Airlines.

The overly broad interpretation of ADA preemption by the Texas supreme court unfairly denies airline consumers their fair day in court. The unfortunate decision is but the latest step in a series of legal maneuvers by the airlines who have used the ADA preemption provision, not for economic deregulation as intended by Congress, but as a sweeping immunity provision to unfairly safeguard the airlines. The stated purposes of the ADA do not countenance this result.[6]

In other contexts, this Court typically starts its preemption analysis with the presumption against preemption – that Congress did not intend to preempt areas of traditional state regulation. "Related to" language contained in a preemption statute will not vitiate this

[6] On July 24, 2003, the DOT recently repealed its long-standing rule detailing its policy statement on federal preemption of state economic regulations. 14 C.F.R. § 399.110 *repealed by* 68 Fed. Reg. 43882-43883 (July 24, 2003). The rule provided examples of regulatory actions preempted under the ADA, specifically, tariff filing, certification, regulations governing flight frequency, mode of operation, in-flight amenities, liability, insurance, bonding, and capitalization. *Id.* § 399.10(d).

presumption. *DeBuono v. NYSA-ILA Medical & Clinical Servs. Fund*, 520 U.S. 806, 815 (1997). Where legislative intent is not "clear and manifest," this Court will not interpret a federal act to supersede the laws of the sovereign states. *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 334 (1997). Black fears that the opinion of the state supreme court fails to accord the proper deference to federalism concerns. Preemption, at its heart, respects "the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Given the Court's reasoning in cases like *DeBuono* and *Dillingham* and its construction of preemption under the Employee Retirement Income Security Act of 1974, this Court should grant review and revisit the scope of preemption under the ADA to take into consideration this trend. After all, *Morales* relied on this Court's ERISA jurisprudence then in effect to strictly interpret the ADA, 504 U.S. at 385, and led us down the path to where Black stands before the court today – a passenger whose state common law rights are completely eviscerated.

CONCLUSION

For the reasons discussed above, the Court should grant the petition for a writ of certiorari and reverse the decision of the Supreme Court of Texas.

Respectfully submitted,

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September 11, 2003

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RE: Case Number: 02-0255
Court of Appeals Number: 10-00-00156-CV
Trial Court Number: F96-06320-K

Style: DELTA AIR LINES, INC. AND AL PEREZ
v.
ROBERT C. BLACK

Dear Counsel:

Today, the Supreme Court of Texas granted the Respondent's motion for rehearing in part. The Court withdraws its opinion and judgment of June 26, 2003, and substitutes the opinion and judgment issued today. The Court reverses the court of appeals' judgment in part and renders judgment. Encl.

Sincerely,

Andrew Weber, Clerk

by /s/ Nancy J. Vega
Nancy J. Vega, Chief Deputy

cc: Ms. Sharri Roessler, Clerk
Mr. Jim Hamlin
John De Noyelles

IN THE SUPREME COURT OF TEXAS

No. 02-0255

DELTA AIR LINES, INC. AND AL PEREZ

v.

ROBERT C. BLACK

ON PETITION FOR REVIEW
FROM THE COURT OF APPEALS
FOR THE TENTH DISTRICT OF TEXAS

CORRECTED JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Tenth District, and having considered the appellate record, briefs, and counsels' argument, concludes that the court of appeals' judgment should be reversed in part.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed in part;

2) Judgment is rendered that Robert C. Black take nothing on his claims against Delta Airlines, Inc. and Al Perez;

3) Delta Air Lines, Inc. and Al Perez shall recover, and Robert C. Black shall pay, the costs incurred in this Court and in the court of appeals; and

4) The court of appeals' opinion is ordered published.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Tenth District and

to the District Court of Dallas County, Texas, for observance.

Opinion of the Court delivered by Justice Jefferson.

September 11, 2003

* * *

IN THE SUPREME COURT OF TEXAS

No. 02-0255

DELTA AIR LINES, INC. AND AL PEREZ, PETITIONERS

v.

ROBERT C. BLACK, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

Argued on January 15, 2003

JUSTICE JEFFERSON delivered the opinion of the Court.

We grant Robert C. Black's motion for rehearing in part. We withdraw our opinion of June 26, 2003 and substitute the following in its place.

The Airline Deregulation Act of 1978 (ADA) provides that states "may not enact or enforce a law . . . related to a price, route, or service of an air carrier. . . ." 49 U.S.C. § 41713(b)(1). This case concerns the scope of this preemption provision, specifically, its application to state breach of contract and misrepresentation claims challenging an airline's ticketing and boarding procedures. The trial court rendered summary judgment in favor of Delta Airlines, Inc. and its gate supervisor, Al Perez, without specifying the grounds. The court of appeals reversed, holding that the ADA did not preempt Black's claims, and remanded the case for trial. ___ S.W.3d ___, ___. We granted Perez and Delta's petition for review to decide whether the ADA

preempts a passenger's state law claims for an airline's alleged failure to honor a confirmed first-class seat. 46 Tex. Sup. Ct. J. 14 (Oct. 10, 2002). We hold that it does and accordingly reverse the court of appeals' judgment in part and render judgment that Black take nothing on his claims against Delta and Perez.

I

BACKGROUND

On June 23, 1995, Robert Black purchased two Delta airline tickets for travel from Dallas/Fort Worth to Las Vegas leaving that afternoon and returning on June 25. The invoice from Black's travel agent showed two first-class reservations for Black and his wife. Although the invoice assigned Black first-class seats for both directions, his wife had an assigned seat only for the return flight. Black's travel agent and manager of Smith Travel & Limousine, Melissa Shinn, suggested that Black ask the Delta gate agent if he and his wife could sit together in first class for the Dallas to Las Vegas flight.

Upon arrival at the departure gate, Black requested adjacent seats in first class. The gate agent said that he would "see what [he] could do." As other passengers boarded the plane, a Delta gate supervisor, Al Perez, appeared and informed Black that he and his wife did not have two confirmed first-class seats for the flight. While Delta had a confirmed first-class seat for Mr. Black, it only had a confirmed coach seat for his wife, whom Delta placed on a priority waiting list for first class. Perez told Black that, unless a first-class passenger relinquished a seat, Black's wife would be seated in coach for the three-hour flight from Dallas to Las Vegas. This would not,

however, affect her first-class seat for the return flight. At Black's request, Perez spoke by telephone with Shinn. Shinn told Perez that her computer showed two confirmed first-class seats from Dallas to Las Vegas. Delta's computers, however, did not show a confirmed first-class seat for Black's wife.

Unable to provide Black's wife with first-class accommodations, Delta offered several alternatives: (1) the Blacks could sit in coach on their scheduled flight, (2) they could fly separately on the scheduled flight, one in coach and one in first class, (3) they could fly first class on a later flight to Los Angeles and then connect to Las Vegas, or (4) they could take a direct flight later that day to Las Vegas with confirmed first-class seats. Each of these alternatives included free travel vouchers, which Black asserts could be used only for coach seats. Black declined Delta's offers. Instead, the Blacks drove to Love Field airport and chartered a private jet to and from Las Vegas at a cost of $13,150, which included the aircrew's expenses in Las Vegas for two days.

Black sued Delta for breach of contract and intentional and negligent misrepresentation, and sued Perez for misrepresentation only.[1] Delta and Perez moved for summary judgment on four grounds: (1) preemption under the

[1] Black also sued Abe Haddad d/b/a Smith Travel & Limousine for breach of contract, intentional and negligent misrepresentation, violations of the Texas Deceptive Trade Practices Act, and negligence. Haddad moved for summary judgment, which the trial court granted. The court of appeals reversed that summary judgment and remanded Black's claims against Haddad for trial. Haddad does not challenge that judgment in this Court.

ADA, (2) Black's failure to mitigate damages, (3) lack of causation, and (4) lack of an agency relationship between Smith Travel and Delta. The trial court granted summary judgment for Delta and Perez, without specifying the grounds. Black appealed the judgment.

The court of appeals reversed the trial court's judgment and remanded the case for trial. The court of appeals held that fact issues precluded judgment as a matter of law on the causation, mitigation, and agency issues. ___ S.W.3d at ___. As to the key issue before this Court, the court of appeals held that Black's claims were not preempted by the ADA because "federal airline regulations allow passengers whose reservations are not honored due to overbooking to seek recovery for damages 'in a court of law or in some other manner.'" *Id.* at ___. We granted Perez and Delta's petition for review to decide the single issue Perez and Delta (collectively, Delta) presented – preemption.

II

APPLICABLE LAW – PREEMPTION

Federal preemption of state law is grounded in the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2. Under the Supremacy Clause, if a state law conflicts with federal law, the state law is preempted and "without effect." *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981). Preemption can take one of several forms. A federal law may preempt a

state law expressly. *Great Dane Trailers, Inc. v. Estate of Wells,* 52 S.W.3d 737, 743 (Tex. 2001). It may also preempt a state law impliedly, either (i) when the scheme of federal regulation is sufficiently comprehensive to support a reasonable inference that Congress left no room for supplementary state regulation or (ii) if the state law actually conflicts with federal regulations. *Id.* A state law presents an actual conflict when a party cannot comply with both state and federal regulations or when the state law would obstruct Congress' purposes and objectives. *Id.*

"The purpose of Congress is the ultimate touchstone" in every preemption case. *Retail Clerks Int'l Ass'n. v. Schermerhorn,* 375 U.S. 96, 103 (1963). Congressional intent is discerned primarily from the statute's language and structure. *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486 (1996). Also relevant is the purpose of the statute as a whole, which is revealed through "the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.*

We begin our analysis with a discussion of the relevant federal statute and the United States Supreme Court cases that control this area.

A

Statutory Framework

Before 1978, the Federal Aviation Act of 1958 (FAA) authorized the Civil Aeronautics Board (CAB) to regulate the interstate airline industry. 49 U.S.C. § 1301 (current version at 49 U.S.C. § 40101); *Am. Airlines, Inc. v. Wolens,* 513 U.S. 219, 222 (1995). The Act provided that "nothing

. . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506. Thus, before 1978, states were allowed to regulate intrastate airfare. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

In 1978, Congress amended the FAA by enacting the Airline Deregulation Act (ADA), which deregulated the industry. 49 U.S.C. § 40101(a)(6), (a)(12)(A) (formerly codified at 49 U.S.C. § 1302(a)(4), (a)(9)). In enacting the ADA, Congress determined that "'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services.'" *Morales,* 504 U.S. at 378 (quoting 49 U.S.C. § 1302(a)(4), (a)(9)). Congress included an express preemption provision in the ADA "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Morales,* 504 U.S. at 378. The preemption clause states:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States *may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier* . . . .

49 U.S.C. § 41713(b)(1) (emphasis added).[2] Thus, to determine the propriety of the court of appeals' judgment, we

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[2] The Blacks base their claims in part on the ADA's savings clause, which provides that "a remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c). This clause, however, has been dismissed as a relic of the FAA and does not

(Continued on following page)

must ascertain whether Black's state law claims fall within the ADA's express preemption provision. If they do, Black's claims fail.

B

Morales and *Wolens*

The Supreme Court has discussed the scope of the ADA's express preemption clause on two occasions. It first considered the ADA's preemptive scope in *Morales,* 504 U.S. at 374. There, the Court examined whether the ADA preempted enforcement of guidelines concerning regulation of airline fare advertising through Texas's consumer protection statutes. *Id.* at 378. The Court focused on the preemption clause's "relating to" language. *Id.* at 383-86. Relying on its ERISA line of cases and the ordinary meaning of the statute's words, the Court construed the phrase "relating to" broadly to preempt "State enforcement actions having a connection with, or reference to, airline 'rates, routes, or services.'" *Id.* at 384. Based on this "broad preemptive purpose," the Court rejected contentions that section 1305(a)(1)[3] only preempted states from actually prescribing rates, routes, or services, or that only state laws specifically aimed at the airline industry were preempted. *Id.* at 384-86.

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supersede the specific substantive preemption provision in the ADA. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 385 (1992).

[3] 49 U.S.C. section 1305(a)(1) is the previous version of the ADA preemption clause. The current version, the one at issue in this case, 49 U.S.C. section 41713(b)(1), was recodified into the Federal Aviation Administration Act in 1994 without substantive change. *Continental Airlines, Inc. v. Kiefer,* 920 S.W.2d 274, 278 (Tex. 1996).

Although the Court warned that "'some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have preemptive effect," it concluded that the obligations imposed by the guidelines would impact airlines' ability to market their product and the fares they charged. *Id.* at 390 (quoting *Shaw v. Delta Air Lines,* 463 U.S. 85, 100 n.21 (1983)). Thus, the guidelines had a "forbidden significant effect" on the airlines' rates, routes, and services, primarily because they restricted fare advertising, which "relates to" price. *Id.* at 388-89. The Court held that, under these circumstances, the ADA preempted the fare advertising provisions in the general state consumer protection statutes at issue. *Id.* at 391.

The only other time the Court has addressed the scope of the ADA's preemption provision was in *American Airlines, Inc. v. Wolens,* 513 U.S. 219. That case involved state law consumer fraud and breach of contract claims arising from retroactive changes in an airline's frequent flyer program. *Id.* at 224-25. The Court focused on another portion of the ADA's preemption clause – the phrase "enact or enforce any laws" – to determine the ADA's preemptive scope. *Id.* at 226. It held that, like the guidelines at issue in *Morales,* Illinois's consumer fraud statute "serve[d] as a means to guide and police the marketing practices of the airlines." *Id.* at 228. Thus, the ADA preempted the plaintiffs' consumer fraud claims. *Id.*

The Court then turned to the plaintiffs' breach of contract claims. *Id.* It held that the ADA's preemption clause did not shield airlines from "suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 228. The Court reasoned that some of the terms and conditions airlines offer, such

as frequent flyer programs, are private obligations and do not amount to State "'enactment or enforcement [of] any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of section 1305(a)(1)." *Id.* at 228-29. The Court limited its holding, however, to suits based on the terms of the parties' bargain "with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 233. Courts have interpreted this to mean that if a contract claim cannot be adjudicated without resort to external law, the claim is preempted by the ADA. *See, e.g., Smith v. Comair, Inc.,* 134 F.3d 254, 257 (4th Cir. 1998); *Boon Ins. Agency, Inc. v. Am. Airlines, Inc.,* 17 S.W.3d 52, 58-59 (Tex. App. – Austin 2000, pet. denied); *Howell v. Alaska Airlines, Inc.,* 994 P.2d 901, 905 (Wash. Ct. App. 2000).

C

Kiefer

In the wake of the Supreme Court's decisions in *Morales* and *Wolens,* lower federal and state courts have struggled with determining when the ADA preempts state law claims.[4] This Court considered the scope of the ADA's preemption clause in *Continental Airlines, Inc. v. Kiefer,* 920 S.W.2d 274 (Tex. 1996). In *Kiefer,* we decided the

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[4] *See, e.g., Taj Mahal Travel, Inc. v. Delta Airlines Inc.,* 164 F.3d 186, 192 (3rd Cir. 1998); *Charas v. Trans World Airlines, Inc.,* 160 F.3d 1259, 1263 (9th Cir. 1998); *Alasady v. N.W. Airlines Corp.,* Civ. No. 02-3669, 2003 U.S. Dist. LEXIS 3841, at *24 (D. Minn. Mar. 3, 2003); *Somes v. United Airlines, Inc.,* 33 F. Supp. 2d 78, 81 (D. Mass. 1999); *Aquino v. Asiana Airlines, Inc.,* 130 Cal. Rptr. 2d 223, 230 (Cal. Ct. App. 2003).

extent to which "state common-law personal-injury negligence actions against airlines are preempted by the [ADA]." *Id.* at 275. Following *Morales* and *Wolens,* we applied a two-part analysis to determine whether the plaintiffs' personal injury claims were preempted. *Id.* at 281-82; *see also* 49 U.S.C. § 41713(b)(1). First, we examined whether the claims related to airline rates, routes, or services. *Id.* at 281. Second, we explored whether the claims constituted the enactment or enforcement of a state law, rule, regulation, standard or other provision. *Id.* at 281-82. We concluded that, although the plaintiffs' personal injury claims clearly related to airlines' services, their claims did not amount to enforcement of a state law and thus were not preempted. *Id.* at 282.

In reaching this conclusion, we acknowledged the difficulty in differentiating between claims that are preempted and those that are not. *Id.* at 281. We noted that, unlike the state consumer protection legislation at issue in *Morales,* negligence actions do not "carry the same 'potential for intrusive regulation of airline business practices. . . .'" *Id.* at 282 (quoting *Wolens,* 513 U.S. at 227). We were careful to state, however, that certain tort actions, such as negligent misrepresentation, may be indistinguishable from the statutory consumer protection actions in *Morales* and *Wolens. Id.* at 283. And depending on the nature and extent of damages sought, even simple negligence actions may constitute an impermissible regulation of the airline industry through state tort law. *Id.* at 282.

Rather than declare categorically that personal injury claims are *always* excepted from preemption, we focused on the extent to which the claims in *Kiefer* threatened to

encroach on the congressional objective of airline deregulation. *Id.* Because preemption depends on the nature of the particular claim, we observed that the ADA's preemptive effect on other state law claims would require a "closer working out." *Id.* at 281. With respect to breach of contract claims, we noted that the "very strict limitation" *Wolens* puts on permissible contract claims "demonstrates the breadth of ADA preemption." *Id.* Like *Wolens,* we recognized that the ADA allows breach of contract claims only if they involve contract terms voluntarily undertaken by the parties. *Id.* at 281-82. And we noted that voluntary contractual undertakings do not "effectuate purposes that could have a prohibited regulatory effect on airlines." *Id.* at 282.

With this framework in mind, we turn to a "closer working out" of the ADA preemption clause with respect to Black's claims. *Wolens,* 513 U.S. at 235; *Kiefer,* 920 S.W.2d at 281.

III

ANALYSIS

Black contends that *Wolens* and *Kiefer* shield his breach of contract claim from preemption. He argues that, by refusing to provide his wife a first-class seat on the flight from Dallas to Las Vegas, Delta breached a self-imposed contractual obligation. Because his claims arise from Delta's own undertakings, as opposed to an obligation imposed by state law, Black argues that there is little risk similar state claims would undo federal deregulation. Thus, according to Black, his claims are not subject to preemption under the ADA.

Delta, on the other hand, contends that Black's claims are preempted by the ADA because they relate directly to the airline services Delta provides. Delta argues that ticketing and boarding procedures are fundamental to airline services and are far removed in character from the voluntary frequent flyer program at issue in *Wolens.* Specifically, Delta contends that because Department of Transportation (DOT) regulations define and control the procedures for denied boarding, Black's state law claims are preempted. For the reasons discussed below, we agree with Delta.

A

Related to an Airline's Services

To answer whether a claim is preempted by the ADA, we first determine whether the claim is related to an airline's prices or services within the meaning of the ADA's preemption provision. *Kiefer,* 920 S.W.2d at 281. The ADA does not specify, and the United States Supreme Court has not determined, what activities constitute airline services. It is not surprising, then, that courts have fashioned inconsistent tests for determining whether a state law action is related to an airline's services. *Compare Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998), *with Hodges v. Delta Airlines, Inc.,* 44 F.3d 334, 336 (5th Cir. 1995). The United States Court of Appeals for the Ninth Circuit has narrowly defined services as "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail." *Charas,* 160 F.3d at 1261. That court reasoned that because the word services appears next to the words rates and routes in section 41713(b)(1), "services" must refer to "the provision of air transportation to and from various markets at

various times." *Id.* at 1266. Under this interpretation, in-flight beverages, personal assistance to passengers, handling luggage, keeping aisles clear, and other amenities are not included in the definition of services. *Id.* at 1261.

The Fifth Circuit's more expansive interpretation of airline services includes "ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself." *Hodges,* 44 F.3d at 336. *Hodges* relied in part on the CAB's statements implementing the ADA, which made clear that reservation and boarding practices are services within the meaning of the ADA. *See id.* at 337 (citing 44 Fed. Reg. 9948, 9951 (Feb. 15, 1979)); *see also Smith v. Am. W. Airlines, Inc.,* 44 F.3d 344, 347 (5th Cir. 1995) (limiting services to "economic decisions concerning boarding, e.g., overbooking or charter arrangements, and contractual decisions whether to board particular ticketed passengers"). The *Hodges* court reasoned that, because these "matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline," Congress intended them to be services protected from state regulation. 44 F.3d at 336.

In this case, Black's claims relate to Delta's boarding procedures and seating policies. Although several courts have fashioned different tests to determine whether a state law action relates to an airline's services, most courts generally agree that state law claims involving seating

and boarding procedures relate to services.[5] This approach is consistent with both the Fifth and Ninth Circuit Court of Appeals' conclusions that an airline's boarding procedures are an integral part of the services that an airline provides. *See, e.g., Somes v. United Airlines, Inc.,* 33 F. Supp. 2d 78, 85 (D. Mass. 1999) (noting that both the Fifth and Ninth Circuits' definitions of services would include boarding). The mere fact that Black's claims relate to the denial of first-class status, rather than point-to-point transportation, does not remove his claims from the definition of "services." *See Wolens,* 513 U.S. at 226 (noting that the term "services" includes "access to flights and class-of-service upgrades").

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[5] *See, e.g., Smith v. Comair,* 134 F.3d 254, 259 (4th Cir. 1998) ("Undoubtedly, boarding procedures are a service rendered by an airline."); *Travel All Over the World, Inc. v. The Kingdom of Saudi Arabia,* 73 F.3d 1423, 1434 (7th Cir. 1996) ("airline 'services' . . . include ticketing"); *Hodges v. Delta Airlines, Inc.,* 44 F.3d 334, 336 (5th Cir. 1995); *Alasady,* 2003 U.S. Dist. LEXIS 3841, at *24 (noting that "the term 'service' in § 41713(b)(1) encompasses boarding procedures"); *Somes,* 33 F. Supp. 2d at 85 ("the denial of boarding and the refusal to transport a particular passenger, . . . without question, are at the heart of the 'services' that airlines provide"); *Nazarian v. Compagnie Nationale Air France,* 989 F. Supp. 504, 510 (S.D.N.Y. 1998) ("[C]ases that involve ticketing, boarding, in-flight services, or the implementation of airline policies, such as 'bumping' of passengers, denial of boarding, . . . relate to services and are preempted."); *Peterson v. Continental Airlines, Inc.,* 970 F. Supp. 246, 250 (S.D.N.Y. 1997) ("A flight crew's conduct during the boarding stage of a flight, specifically, flight attendants' efforts to locate appropriate seat assignments and resolve seat conflicts, constitutes an airline service. . . ."); *Pearson v. Lake Forest Country Day Sch.,* 633 N.E.2d 1315, 1320 (Ill. App. Ct. 1994) ("An airline's boarding and seating policies come within the ambit of the 'services' it provides to its customers."); *El-Menshawy v. Egypt Air,* 647 A.2d 491, 492 (N.J. Super. Ct. Law Div. 1994) (The plaintiff's claim against the airline – "that it failed to honor an allegedly confirmed reservation – beyond a shadow of a doubt 'relates to' airline services.").

Unlike the frequent flyer program in *Wolens,* seating policies and boarding procedures are not peripheral to the operation of an airline, but are inextricably linked to the contract of carriage between a passenger and the airline and have a definite "connection with, or reference to" airline services. *Morales,* 504 U.S. at 384. Given *Morales'* broad interpretation of the words "relating to," and the generally accepted understanding of the word "services," we conclude that an airline's boarding procedures and seating policies "relate to" the services an airline provides to its customers.

We next consider whether the ADA prohibits enforcement of Black's claims.

B

State Enactment or Enforcement

The second step in the preemption analysis involves determining whether Black's claims, if allowed, would constitute enactment or enforcement of a state law within the meaning of the ADA's preemption clause. *Kiefer,* 920 S.W.2d at 281. In deciding whether contract claims are preempted, we distinguish between obligations dictated by the State and those voluntarily undertaken by the airline. *Wolens,* 513 U.S. at 233. When parties privately negotiate a contract's terms and then sue in state court for breach of those terms, there is generally no specter of state-imposed regulation. *Id.* at 228-29. Thus, as we noted in *Kiefer,* the enforcement of a contractual commitment voluntarily undertaken does not amount to state enactment or enforcement of a law that the ADA's preemption provision forbids. 920 S.W.2d at 281-82.

In *Wolens,* the Supreme Court determined that a frequent flyer program was a self-imposed undertaking between private parties and was therefore too tenuous or peripheral to constitute state enforcement. 513 U.S. at 228-29. Unlike Wolens' claims that related to a self-imposed frequent flyer program, Black's claims relating to Delta's ticketing and boarding procedures implicate directly the federal interest in deregulated air transportation. *See Somes,* 33 F. Supp. 2d at 85; *Rockwell v. UPS,* No. 2:99-CV-57, 1999 U.S. Dist. LEXIS 22036, at *6 (D. Vt. July 7, 1999) (noting that "preemption applies to services which are 'regular, recurrent, or necessary features of actual flight or airline operations' (as opposed to beverage services and similar amenities)") (quoting *Somes,* 33 F. Supp. 2d at 83); *Smith,* 134 F.3d at 259; *Chukwu v. Bd. of Dirs. British Airways,* 889 F. Supp. 12, 13 (D. Mass. 1995). Thus, contrary to the ADA's purpose, Black's claims have the potential for "intrusive regulation of airline business practices." *Kiefer,* 920 S.W.2d at 282.

When Black purchased the airline tickets, a binding contract of carriage was created between Black and Delta. *See Woodward v. Tex. & P. Ry. Co.,* 86 S.W.2d 38, 39 (Tex. 1935); *Boon,* 17 S.W.3d at 55. Pursuant to the regulatory authority conferred by Congress under the ADA, the DOT promulgated comprehensive regulations interpreting the ADA. Black and Delta's contract for carriage incorporates these regulations. *See* 14 C.F.R. §§ 253.4, .5; *Wolens,* 513 U.S. at 230 (authorizing airlines to incorporate the federal regulations into their contracts of carriage). In particular, part 250 permits the DOT to regulate "oversales" in air carrier service. 14 C.F.R. §§ 250.1-.9. These regulations require every air carrier to "establish priority rules and criteria for determining which passengers holding

confirmed reserved space shall be denied boarding on an oversold flight in the event that an insufficient number of volunteers" agree to relinquish their seat. *Id.* § 250.3.

Section 250.5 requires airlines to pay compensation to any passenger who is involuntarily denied boarding caused by an oversold flight. *Id.* § 250.5. A passenger who is involuntarily denied boarding, however, is not required to accept this compensation and can instead "decline the payment and seek to recover damages in a court of law or in some other manner." *Id.* § 250.9. The federal regulations also provide that under certain circumstances, a passenger denied boarding involuntarily from an oversold flight is not entitled to receive compensation from the airline. *Id.* § 250.6. In particular, if a passenger "is offered accommodations or is seated in a section of the aircraft other than that specified on the ticket at no extra charge," then that passenger is not eligible for denied boarding compensation. *Id.* § 250.6(c).

Black contends that, pursuant to section 250.9, he had the option to decline compensation under the federal scheme and instead "seek to recover damages in a court of law." *Id.* § 250.9(b). The court of appeals agreed and held that, although Black was not entitled to denied boarding compensation, he could forego the remedies provided by the DOT regulations and seek damages in court. ___ S.W.3d at ___. The court of appeals based its decision on the DOT regulations relating to passengers that are *involuntarily* denied boarding. *Id.; see also* 14 C.F.R. § 250.9. But Black and the court of appeals misread these regulations. Black was not denied boarding, as that term relates to section 250.9.

The passenger option of declining payment from the airline and instead seeking recovery in a court of law is reserved for those passengers who are involuntarily denied boarding and thus eligible for denied boarding compensation. 14 C.F.R. § 250.9. Because Delta offered Black's wife another seat on the same flight, she was not denied boarding. Even if we considered Black's wife to have been involuntarily denied first-class boarding, the Blacks do not have a valid claim for "denied boarding compensation." This is so because they fall within one of the eligibility exceptions to qualify for compensation – a passenger is not eligible for denied boarding compensation if the airline offers the passenger accommodations in another section of the aircraft at no charge. *Id.* § 250.6. Because Delta offered Black and his wife various accommodations, including coach seats, Black and his wife were ineligible for denied boarding compensation. *Id.* And because Black and his wife were not eligible to receive the denied boarding compensation from Delta, they could not possibly decline this compensation and "seek to recover damages in a court of law." *Id.* § 250.9. Accordingly, Black cannot rely on section 250.9, which, as a prerequisite to recover, requires the party to be eligible to receive denied boarding compensation.

As discussed above, the parties' contract incorporated the DOT regulations on denied boarding compensation. Black, however, seeks to enlarge Delta's obligations to him. He attempts to modify the contract terms to allow him and his wife to forego the regulatory remedies and instead sue in court. This Court, however, is confined, "in breach-of-contract actions, to the parties' bargain." *Wolens,* 513 U.S. at 233. We cannot enlarge or enhance that bargain based on state law or policies external to the

agreement. *Id.* Nothing in the contract entitles Black to the external remedy of reimbursement for the cost of a private chartered jet. The regulations promulgated under the ADA, which are incorporated as part of the contract, provide the procedure and remedy in the event a passenger is denied boarding but offered specified accommodations, and therefore preclude the additional remedies Black has pursued in state court. *See* 14 C.F.R. §§ 250.1-.9.

Even were the contract silent about the federal regulations, other courts have applied similar reasoning to preempt breach of contract claims that relate to price or service and seek to impose state laws or policies.[6] As the court of appeals in this case correctly noted:

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[6] *See, e.g., Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 288 (5th Cir. 2002) (breach of contract claim was preempted because it had a connection with an airline's prices and services); *Smith*, 134 F.3d at 259 (breach of contract claim was preempted to the extent it complained of an airline's boarding procedures); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 542 (7th Cir. 1993) (passenger's breach of contract challenge to an airline's ten percent cancellation policy was preempted because it related to price); *Breitling U.S.A. Inc., v. Fed. Express Corp.*, 45 F. Supp. 2d 179, 186-87 (D. Conn. 1999) (breach of contract claim arising from a contract to transport watches was preempted because it amounted to an enlargement or enhancement based on state laws or policies external to the parties' agreement); *Leonard v. N.W. Airlines, Inc.*, 605 N.W.2d 425, 431 (Minn. Ct. App. 2000) (breach of contract claim regarding a reissue fee was preempted because it related to price and sought to enforce state law); *Blackner v. Continental Airlines, Inc.*, 709 A.2d 258, 260 (N.J. Super. Ct. App. Div. 1998) (breach of contract claim was preempted because it constituted an enlargement or enhancement of a passenger's rights based on state laws or policies); *Boon Ins. Agency, Inc. v. Am. Airlines, Inc.*, 17 S.W.3d 52, 58-59 (Tex. App. – Austin 2000, pet. denied) (breach of contract claim involving a reissue fee was preempted because it sought to modify the contract by relying on state law); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 905 (Wash.

(Continued on following page)

> [W]e cannot overlook the fact that the alleged contractual violation at issue in this appeal involves a common condition unique to the airline industry – the failure to seat an allegedly confirmed ticket holder because of overbooking – and that unlike the frequent-flier agreements at issue in *Wolens,* specific federal regulations govern compensation for air passengers who are involuntarily prevented from boarding a flight due to overbooking.

___ S.W.3d at ___. These "specific federal regulations" have a national purpose in that they provide a uniform system of compensation to passengers. If passengers were permitted to challenge airlines' boarding procedures under state common law, the airline industry would potentially be subject to regulation by fifty different states. *Smith,* 134 F.3d at 258-59 (allowing passengers to challenge boarding procedures would permit "the fifty states to regulate an area of unique federal concern – airlines' boarding practices."); *see also* John W. Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978,* 44 J. AIR L. & COM. 747, 755 (1979) (noting that "the effect of the provision was to 'prevent conflicts and inconsistent regulations' ") (quoting H.R. REP. NO. 1211, 95th Cong., 2d Sess. 16 (1978)). The fact that federal regulations expressly

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Ct. App. 2000) (breach of contract challenge to an airline's refusal to refund the price of a nonrefundable ticket was preempted because it sought to enlarge or enhance the agreement based on external state laws). *But see Travel All Over the World, Inc.,* 73 F.3d at 1432 (breach of contract claim was not preempted because it involved the breach of a self-imposed undertaking); *Aquino,* 130 Cal. Rptr. 2d at 233 (breach of contract claim was not preempted because it did not involve a state policy).

address airline boarding procedures strengthens our conclusion that Black's breach of contract claims resulting from Delta's boarding and seating procedures are preempted by the ADA. To hold otherwise could create extensive multi-state litigation, launching inconsistent assaults on federal deregulation in the airline industry, every time an airline reassigned a passenger's seat.

We conclude that Delta's boarding and seating policies relate to the services it provided to Black, and that Black's claims can only be adjudicated by reference to laws and policies external to its contract with Delta. Accordingly, we hold that 49 U.S.C. section 41713(b) preempts Black's contract claims.

We now turn to Black's remaining claims for misrepresentation and fraud, which he argues survive ADA preemption. We disagree. Because Black's misrepresentation and fraud claims are premised on Delta's ticketing and boarding procedure, they are directly related to Delta's services. *See* discussion *supra* Part III.A. The court of appeals concluded, however, that because Black's misrepresentation claims did not turn on any requirement imposed by a Texas legislative body, they were not preempted. ___ S.W.3d at ___. To the contrary, state tort actions can be state enforcement under 49 U.S.C. section 41713(b)(1). *See, e.g., Buckman Co. v. Plaintiff's Legal Comm.,* 531 U.S. 341, 351 (2001); *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247 (1959) (recognizing the regulatory effect of state law damage claims and their potential for frustrating congressional objectives); *Kiefer,* 920 S.W.2d at 282.

Moreover, both *Wolens* and *Kiefer* suggest that state misrepresentation and fraud claims are preempted by the

ADA. *Wolens,* 513 U.S. at 228; *Kiefer,* 920 S.W.2d at 283. *Wolens* held that state law claims under a state consumer fraud act were preempted by the ADA. *Wolens,* 513 U.S at 228. Claims under a consumer fraud statute are comparable to claims for misrepresentation. In *Kiefer,* we indicated that "an action for negligent misrepresentation might be . . . indistinguishable from the statutory consumer protection actions in *Morales* and *Wolens.*" *Kiefer,* 920 S.W.2d at 283. Both would impose state policies on the operation of air carriers that are external to the parties' agreement. *Wolens,* 513 U.S. at 229 n.5; *Kiefer,* 920 S.W.2d at 282. A state's common law cannot operate against an airline in this context when it would constitute state enforcement of a law relating to airline services. *See Morales,* 504 U.S. at 383. Accordingly, because Black's misrepresentation and fraud claims relate to the services Delta provides and if allowed would amount to enactment or enforcement of state law, they are preempted.

IV

CONCLUSION

For these reasons, we reverse the court of appeals' judgment in part and render judgment that Black take nothing on his claims against Delta Airlines, Inc. and Al Perez.

Wallace B. Jefferson
Justice

OPINION DELIVERED: September 11, 2003

[SEAL]

TENTH COURT OF APPEALS

Chief Justice
Rex D. Davis

Justices
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Clerk
Sharri Roessler

January 30, 2002

In accordance with the enclosed Opinion, below is the judgment in the numbered cause set out herein to be entered in the Minutes of this Court as of the 30th day of January, 2002.

10-00-156-CV ROBERT C. BLACK v. DELTA AIRLINES, INC., AL PEREZ, AND ABE HADDAD D/B/A SMITH TRAVEL & LIMOUSINE – ON APPEAL FROM 192nd DISTRICT COURT OF DALLAS COUNTY – TRIAL COURT NO. 96-06320-K – REVERSED AND REMANDED – Opinion by Justice Richards (Sitting by Assignment) – Concurring Opinion by Justice Gray:

"This cause came on to be heard on the transcript of the record, and the same being considered, because it is the opinion of this Court that there was error in the judgment of the court below; it is therefore ordered, adjudged and decreed that the judgment of the court below be, and hereby is, reversed and this cause is remanded to the 192nd Judicial District Court of Dallas County, Texas, in accordance with the opinion of this Court. It is further ordered that Appellees Delta Airlines, Inc., Al Perez, Abe

Haddad d/b/a Smith Travel & Limousine pay costs of appeal and that this decision be certified below for observance."

[SEAL]

IN THE
TENTH COURT OF APPEALS

No. 10-00-156-CV

ROBERT C. BLACK,

Appellant

v.

DELTA AIRLINES, INC., AL PEREZ, AND ABE HADDAD D/B/A SMITH TRAVEL & LIMOUSINE,

Appellees

From the 192nd District Court
Dallas County, Texas
Trial Court # 96-06320-K

ORDER

The motion for rehearing filed by Delta Airlines, Inc. and Al Perez is denied. The majority and concurring opinions and the judgment dated September 12, 2001, are withdrawn, and the majority and concurring opinions and judgment dated January 30, 2002, are substituted therefor.

PER CURIAM

Before Justice Vance,
Justice Gray, and
Justice Richards (Sitting by Assignment)

Order issued and filed January 30, 2002
Do not publish
[CV06]

[SEAL]

IN THE
TENTH COURT OF APPEALS

No. 10-00-156-CV

ROBERT BLACK,

Appellant

v.

DELTA AIRLINES, INC., AL PEREZ, AND ABE HADDAD D/B/A SMITH TRAVEL & LIMOUSINE

Appellees

From the 192nd District Court
Dallas County, Texas
Trial Court # F96-06320-K

OPINION

This is an appeal from two take nothing summary judgment orders entered against Robert Black ["Black"], a Dallas resident, in connection with his suit for damages arising from a planned airline flight to Las Vegas from Dallas/Fort Worth International Airport. The summary judgment motions were filed pursuant to TEX. R. CIV. P. 166a(b). Delta Airlines, Inc. ["Delta"], Al Perez ["Perez"], and Abe Haddad d/b/a Smith Travel & Limousine ["Smith Travel"] were defendants in the court below. We will reverse the district court's summary judgment orders and remand the case for trial.

I. Factual Background

On June 23, 1995, Black purchased two airline tickets for seats on Delta Airlines for an afternoon flight to Las Vegas, Nevada. According to Black, he intended the trip to be a surprise present for his wife, Mary. Black hoped that the trip would help repair his damaged marriage and, to that end, he attempted to ensure a romantic weekend by arranging for, among other things, first-class airline seats, a leisurely dinner, and tickets to a Tom Jones concert on the evening of their arrival. Viewed in the light most favorable to Black, the nonmovant in the district court, the record reflects the following events:

Black purchased the airline tickets on June 23, 1995 from Smith Travel, a Dallas travel agency. The cost for the two, round-trip, first-class tickets was $2,384, an amount Black charged on a credit card. The written invoices appellant received from Smith Travel reflected two first-class reservations on Delta Airlines Flight 661 to Las Vegas, scheduled to depart that same day, June 23, at 3:18 p.m. The invoices also reflected the details of a scheduled return flight to Dallas on June 25. Close inspection of the invoices shows seat assignments for "Robert Black" for both directions, however, Mary Black's invoice reflects a seat assignment only for the return flight. Nevertheless, her invoice reflects first-class reservations both directions. According to Black, Melissa Shinn, the manager of Smith Travel, personally represented to him that both tickets were confirmed for first-class travel. Two round-trip tickets accompanied the itinerary/invoices. Each ticket indicates, "Issued by DELTA AIRLINES INC," and reflects first-class travel for each of the Blacks on flight 661 to Las Vegas, and flight 1800 on the return trip.

The Blacks arrived at the gate prior to departure and informed the gate agent that they desired to sit together. The agent said, "I'll see what I can do." As the plane boarded, a Delta supervisor, Al Perez, appeared and told the Blacks that there was a problem with their reservations and that one of the tickets was, in fact, not confirmed for first-class travel. According to Delta, Black's ticket was confirmed for first-class, but the ticket for Mary was merely a confirmed ticket for a seat in coach, which had been placed on a "priority wait list for first-class." Because first-class was completely filled, Mary would have to fly in coach. Perez spoke on the phone to Shinn, then told the Blacks that Shinn's computer indicated that the tickets were confirmed for first-class. Perez told them that Delta's computer indicated Mary's ticket was not confirmed. The Blacks presented summary judgment evidence that this situation is routinely encountered by Delta and that hundreds of times passengers arrive at the gate with confirmed tickets that are somehow not reflected in the SABRE reservation system used by Delta. In response to the Blacks plight, several alternatives were offered by Perez: the Blacks could sit together in coach; fly separately, one in coach, one in first-class; or take a later flight. Black presented evidence that the offered alternatives were unacceptable given the purpose of the trip: a first-class romantic flight, and the tight schedule for attending already paid-for functions in Las Vegas, including the Tom Jones concert that evening.

After rejecting Delta's proposed alternatives Black made other flight arrangements. At a cost of $13,150, Black hired a private air carrier to transport them to Las Vegas.

II. Procedural Background

Black sued Delta under theories of breach of contract, intentional misrepresentation, and negligent misrepresentation. He sued Haddad, in his capacity as owner of Smith Travel, under theories of breach of contract, intentional misrepresentation, negligent misrepresentation, violations of the Texas Deceptive Trade Practices Act,[1] and negligence. Black sued Perez, the Delta flight supervisor, for intentional misrepresentation and negligent misrepresentation.[2]

Delta and Perez moved for summary judgment on four grounds: (1) preemption under the Airline Deregulation Act of 1978 ["ADA"];[3] (2) lack of causation; (3) avoidable consequences; and (4) Smith Travel's lack of an agency relationship with Delta. That motion for summary was granted. Haddad moved for summary judgment on similar grounds, save for the agency claim. In addition, Haddad alleged that summary judgment was proper because he was not the owner of Smith Travel at the time Black purchased the tickets. His motion for summary judgment was also granted.

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[1] *See* TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 2001).

[2] Other parties originally included in the suit were either nonsuited by Black or had default judgments entered against them.

[3] *See* 49 U.S.C. § 1305 (1994).

III. Discussion

A. Standard of review

In a summary judgment case, the issue on appeal is whether the movant met his summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.,* 988 S.W.2d 746, 748 (Tex. 1999); *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 (Tex. 1979). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *Rhone-Poulenc, Inc. v. Steel,* 997 S.W.2d 217, 223 (Tex. 1999); *Friendswood Dev. Co. v. McDade & Co.,* 926 S.W.2d 280, 282 (Tex. 1996); *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.,* 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant. *Great Am.,* 391 S.W.2d at 47.

In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence are disregarded and the evidence favorable to the nonmovant is accepted as true. *Rhone-Poulenc,* 997 S.W.2d at 223; *Harwell v. State Farm Mut. Auto. Ins. Co.,* 896 S.W.2d 170, 173 (Tex. 1995). Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am.,* 391 S.W.2d at 47.

The summary judgment will be affirmed only if the record establishes that the movant has conclusively proved all essential elements of the movant's cause of action or defense as a matter of law. *Clear Creek Basin,* 589 S.W.2d at 678. Where, as here, the trial court grants summary

judgment in a general order without specifying the ground or grounds relied on for its ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. *Star-Telegram, Inc. v. Doe,* 915 S.W.2d 471, 473 (Tex. 1995).

B. Preemption Analysis

We begin by considering whether the ADA prevents Black from advancing his causes of action in state court. Under the supremacy clause of the United States Constitution, federal law may preempt state law either by express provision, by implication, or by a conflict between federal and state law. *N.Y. Conference of Blue Cross v. Travelers Ins.,* 514 U.S. 645, 653-55, 115 S.Ct. 1671, 1676, 131 L.Ed.2d 695 (1995), *see also* U.S. CONST. ART. VI. The manifest intent of the ADA's preemption provision is to "ensure that the States would not undo federal deregulation with regulation of their own." *American Airlines v. Wolens,* 513 U.S. 219, 222, 115 S.Ct. 817, 821, 130 L.Ed.2d 715 (1995) (quoting *Morales v. TransWorld Airlines Inc.,* 504 U.S. at 378, 112 S.Ct. at 2034); *see also Legend Airlines v. City of Fort Worth,* 23 S.W.3d 83 (Tex. App. – Fort Worth 2000, pet. denied). The ADA prohibits States from "enact[ing] or enforc[ing] any law . . . relating to [air carrier] rates, routes, or services." 49 U.S.C. § 40101, *et seq.* (1995).[4] This language has been interpreted by the

[4] The Federal Aviation Act cited by the parties was repealed, revised, and recodified in July 1994, prior to the date Black purchased his tickets. Congress enacted 49 U.S.C. § 40101, *et seq.* (1995), which replaced section 1305 without substantive change. The new law includes section 41713 entitled "Preemption of authority over prices, routes, and services," intended to replace section 1305. The revised

(Continued on following page)

United States Supreme Court as preempting, and thus barring, state-imposed regulations of air carriers. *American Airlines, Inc. v. Wolens,* 513 U.S. at 222. Claims for breach of contract,[5] however, do not constitute "state imposed regulations," where parties seek redress in state court for the violation of contract terms set by the parties themselves. *Id.* at 232. The specific issues addressed in *Wolens* involved claims brought in Illinois state court alleging that American Airlines' action in changing mileage credits in its frequent flier program for credits passengers had already accumulated, constituted a breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act), 815 Ill. Comp. Stat. Sec 505/1 et seq. (1992). *Id.* at 224.

Because the Illinois Consumer Fraud Act controlled the primary conduct of those parties falling within its

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section contains only a few minor changes in the language, but the substance is left intact. Section 41713(b)(1) in part provides: "a State . . . may not enact or enforce a law . . . having the force and effect of law related to price, route, service of an air carrier . . . " This is substantially the same as the old section 1305 cited by the parties. The legislative history indicates that the "purpose of [the revision] is to restate in comprehensive form, without substantive change, certain general and permanent laws related to transportation and . . . to make other technical improvements in the Code." H.R. Rep. No. 180, 103rd Cong., 2nd Sess. 1 (1993) *reprinted in* 1994 U.S. Code Cong. and Admin. News at 818.

[5] A claim for a breach of contract requires proof that (1) a binding contract existed; (2) defendants breached the contract; (3) plaintiffs suffered damages caused by the defendant's alleged breach. *East Tex. Med. Center Cancer Inst. v. Anderson,* 991 S.W.2d 55, 62 (Tex. App. – Tyler 1998, pet. denied); *Ryan v. Superior Oil Co.,* 813 S.W.2d 594, 596 (Tex. App. – Houston [14th Dist.] 1991, writ denied).

governance, the United States Supreme Court held that the Illinois statute might be used as a means to guide and police the marketing practices of airlines. *Id.* at 232. Noting that the purpose of the Airline Deregulation Act was to prohibit the states from controlling the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services, the Supreme Court held the ADA preempted the plaintiff's claims under the Illinois Consumer Fraud Act. *Id.* at 228-232.[6]

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[6] In *Morales,* the high court held the ADA precluded state attorneys general from seeking to compel air carriers to comply with guidelines adopted by the National Association of Attorneys General. *Morales,* 504 U.S. at 383-90, 112 S.Ct. at 2036-40. *American Airlines v. Wolens* stands for the proposition that the ADA does not preclude state courts from entertaining certain common law tort and contract actions based on the actions of air carriers. *See American Airlines v. Wolens,* 513 U.S. at 232-34, 115 S.Ct. at 826.

Using those benchmark cases as guides, reviewing courts of this state have carefully examined the nature of the plaintiff's cause of action in order to determine whether the claim is preempted by the ADA. *See Continental Airlines, Inc. v. Kiefer,* 920 S.W.2d 274, 284 (Tex.1996) (claims for simple negligence held not preempted by the ADA); *The Boon Insurance Agency, Inc. v. American Airlines, Inc.,* 17 S.W.3d 52 (Tex. App. – Austin 2000) cert. denied 148 L.Ed.2d 712 (2000) (class-action suit challenging penalties imposed by the airline when the holder of an economy-class ticket fails to travel according to the ticket's original terms, held barred by preemption doctrine because claim sought to modify terms of the contract by relying on state law); *Legend Airlines v. City of Fort Worth,* 23 S.W.3d 83 (Tex. App. – Fort Worth 2000, pet. denied) (enforcement of bond ordinance restrictions to prevent long-haul air service at Dallas Love Field held preempted by the ADA); *Shupe v. American Airlines Airlines* [sic], *Inc.* 893 S.W.2d 305 (Tex. App. – Fort Worth 1995), aff'd 920 S.W.2d 274 (Tex.1996) (breach of contract cause of action for failure to comply with agreement to provide a "meet and assist" service at airport terminal gate held not preempted).

A different result was reached by the high court on the question of whether breach of contract claims are pre-empted. Reasoning that the Airline Deregulation Act was not intended to regulate contracts between individual parties, the court held it would not read the preemption clause, 49 U.S.C.S. § 1305(a)(1), to "shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings," and ruled breach of contract causes of action were not subject to federal preemption. *Id.* at 229, 115 S.Ct. at 824. The Supreme Court clarified its ruling by noting the disparate treatment of statutory causes of action as opposed to those arising out of contractual agreements:

> This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

Id. at 233, 115 S.Ct. 232 (footnote omitted).

A rote application of the ruling in *Wolens* would require us to hold that Black's breach of contract claim against Delta is permissible because it involves alleged violations of "the parties bargain," rather than state laws external to the agreement. Nevertheless, we cannot overlook the fact that the alleged contractual violation at issue in this appeal involves a common condition unique to the airline industry – the failure to seat an allegedly confirmed ticket holder because of overbooking – and that unlike the frequent-flier agreements at issue in *Wolens,* specific federal regulations govern compensation for air passengers who are involuntarily prevented from boarding

a flight due to overbooking. *See* 14 C.F.R. §§ 250.4, 250.5, 250.6 (1984).

In other contexts, the Supreme Court has held that when the statute is silent or ambiguous courts should turn to agency regulations for clarification. *West v. Northwest Airlines, Inc.,* 99 F.2d 148 (9th Cir. 1993). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to provide a specific provision of the statute by regulation. Federal regulations provide for compensation for passengers whose confirmed reservations are not honored, without requiring that the passenger prove economic damages or physical injury. 14 C.F.R. §§ 250.4, 250.5, 250.6 (1984). The regulations provide for a maximum compensation of $400, which is halved if the carrier provides alternate transportation that is planned to arrive at the passenger's next destination within a designated time of the arrival time of the original flight from which the passenger is bumped for flights within the United States and its territories. Significantly, 14 C.F.R. § 250.2a states that the policy behind its creation is to ensure that every air carrier ensure that the smallest practicable number of persons holding confirmed reserved space on flights are denied boarding involuntarily. The regulations provide a uniform system of compensation that may be enforced by the ticket holders, or declined by the ticket holders, at their discretion, in favor of damages to be decided "in a court of law or in some other manner." *See* 14 C.F.R. § 250.9(b) (1984). By Black's own admission Delta attempted to placate him with alternatives, but none were acceptable.

As noted above the regulations provide that the "*bumped passenger has the right to decline the compensation provided for in the regulation and seek to recover*

damages in a court of law." *See* 14 C.F.R. § 250.10 (1984) (Emphasis added). Delta argues Black was not bumped because she was offered $60 compensation for sitting in the flight's coach cabin, rather than in the first class cabin. According to Delta, all other remedies are preempted because § 250.6, provides that, among other exceptions to eligibility for "denied boarding compensation," are passengers " . . . seated in a section for which a lower fare is charged shall be entitled to an appropriate refund." Black produced summary judgment evidence showing she held a confirmed, first-class ticket. Delta produced summary judgment evidence showing the ticket was confirmed only for coach. As noted above, settled summary judgment law requires us to construe the evidence in the light most favorable to Black, the nonmovant. Under this standard, we assume that Black was denied her "confirmed reserved space"[7] on Flight 661 due to airline overbooking. Addressing Delta's claim that Black was entitled to only $60 because she was offered seating in coach, we note that 14 C.F.R. § 250.6 does not specifically preempt Black's claim. It merely lists Black's situation (denied first class boarding with an offer for coach boarding) as an "exception" to "eligibility for denied boarding compensation." We therefore agree with Delta's contention that, because Mary was offered coach seating, Black would not be entitled to demand the federally required damages available to

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[7] *See* 14 C.F.R. § 250.1 (1983). "'*Confirmed reserved space*', means space on a specific date and on a specific flight and class of service of a carrier which has been requested by a passenger and which the carrier or its agent has verified, by appropriate notation on the ticket or in any other manner provided therefor by the carrier, as being reserved for the accommodation of the passenger."

"bumped" passengers choosing compensation under the regulations of "200 percent of the sum of the values of the passenger's remaining flight coupons up to the passenger's next stopover, or if none, to the passenger's final destination, with a maximum of $400." 14 C.F.R. § 250.5. However, to say the [sic] Black cannot claim damages outside the regulation's compensation system would be incorrect. In fact, nothing in the code of federal regulations bars anyone from foregoing regulation remedies and seeking damages in state court. 14 C.F.R. § 250.9 (1984) requires the airlines to inform passengers paid compensation that "[a]cceptance of the compensation may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. *However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.*" (Emphasis added). Because federal airline regulations allow passengers whose airline reservations are not honored due to overbooking to seek recovery for damages "in a court of law or in some other manner," we hold that Black's breach of contract cause of action against Delta is not preempted by the ADA. Moreover, even if Delta were correct in its contention that passengers in Black's situation can recover only an "appropriate refund" for involuntary seating in coach while holding a reserved, first class ticket, Delta has not shown that the $60 tendered to Black was "appropriate."

Federal regulations provide that a person offered accommodations in a section of the aircraft other than as specified on their ticket gives up his or her right to compensation under scheme available in the regulations, but no such waiver is stated for persons who choose the "passenger option" of "recovering damages in a court of

law." *See* 14 C.F.R. § 250.9 (1984). We additionally note that Black contends no Delta employee requested other first-class passengers holding reservations to volunteer for a payment of Delta's choosing in return for sitting in coach. If Mary's ticket was confirmed for first-class and Delta did not request volunteers from other ticketed passengers to give up their seat assignment in exchange for an airline incentive, Delta itself was in violation of the very federal regulations it contends foreclose Black from recovering in a court of law. 14 C.F.R. § 250.9 (1984) provides:

> Written explanation of denied boarding compensation and boarding priorities.
>
> (a) Every carrier shall furnish passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space immediately after they are denied boarding occurs, a written statement explaining the terms, conditions, and limitations of denied boarding compensation. . . .
>
> (b) The statement shall read as follows:
>
> If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his or her will until airline personnel first ask for volunteers who will give up their reservation willingly, in exchange for a payment of the airline's choosing. If there are not enough volunteers, other passengers may be denied boarding involuntarily in accordance with the following boarding priority of (name of air carrier): (In this space carrier inserts its boarding priority rules or a summary thereof, in a manner to be understandable to the average passenger).

To be sure, Delta offered summary judgment evidence that Al Perez *did* seek volunteers from other first-class passengers and that, in fact, he offered the generous incentive of an additional round-trip ticket to anywhere in the United States to any first-class passenger who would give up their seat to Mary and agree to fly on the same flight in coach. According to Perez, only after no passenger volunteered did he deny Mary first-class seating. However, other evidence suggested that was not true. Every reasonable inference must be indulged in favor of the nonmovant and every doubts resolved in its favor. *See, e.g., Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Black offered summary judgment evidence that he and his wife arrived at the departure gate between one hour and forty-five minutes in advance of boarding, that he did not witness Perez seeking volunteers from the other first-class passengers, and that, in fact, the flight was already in the process of boarding when Mary was first informed that her reservation for first-class would not be honored. Significantly, Black also averred that Perez did not appear at the gate until the gate agents were in the process of boarding passengers for the flight. It is reasonable to infer that if Perez had asked every first-class passenger to volunteer to give up their ticket, he would have done so over the gate public address system. Because Black was present when Perez arrived at the gate and did not witness Perez make any offer seeking volunteers from the other first-class passengers, in viewing the evidence in the light favorable to Black, a reasonable inference is that Delta did not seek volunteers before denying Mary first-class seating.

Whether Black's claims against Delta for intentional and negligent misrepresentation[8] are preempted by the ADA presents a closer question. In both *Morales* and *Wolens,* the United State's Supreme Court held that causes of action based on state consumer protection statutes are preempted under the ADA. The Texas Supreme Court accurately predicted in *Continental Airlines v. Kiefer* that this very question would one day be presented to a reviewing court:

> *An action for negligent misrepresentation might be argued to be indistinguishable from the statutory consumer protection actions [held preempted] in Morales and Wolens.* Strict products liability could be argued to embody State policies to a degree prohibited by ADA regulation policy. These are but two examples. *We need not address these issues here but leave them for "a closer working out" in future cases.* We hold only that the ADA does not preempt common-law personal injury cases negligence claims against air carriers, subject to the reservations we have expressed as to damages.

Continental Airlines v. Kiefer, 920 S.W.2d 274, 283 (Tex. 1996).

We now proceed to the "closer working out," anticipated in *Kiefer.* We begin by noting that while Black seeks relief under the Texas consumer protection law corollary to the state laws held preempted by the ADA in *Morales* and

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[8] We here address only the issue of preemption. Whether the facts could support a claim under either of these theories was not presented to the trial court.

Wolens – the Texas Deceptive Trade Practices Act[9] – he does so only in relation to his claims against Haddad, the owner of the travel agency. A claim against Delta for alleged violations of the Deceptive Trade Practices Act would be preempted by the ADA, in order to prevent our state legislature from controlling, through consumer protection acts, "the design and implementation of marketing mechanisms appropriate to the furnishing of air transportation services." *See American Airlines v. Wolens,* 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); *See also Shupe v. American Airlines, Inc.,* 893 S.W.2d 305, 307-308 (Tex. App. – Fort Worth 1995), affirmed 920 S.W.2d 274. However, the theories of intentional and negligent misrepresentation actually pleaded by Black do not turn on any requirement imposed on Delta by any Texas legislative body. Instead they turn on representations alleged by Black to have been personally made to him by Delta through Perez, and Delta's alleged agent, Haddad. This makes the misrepresentation causes of action more similar to the breach of contract claims historically held not to be preempted by the ADA, than the consumer protection act causes of action determined by courts to be preempted, because the misrepresentation claims involve actions between the parties in connection with "self-imposed undertakings," a factor deemed significant by the Supreme Court in *Wolens.* cite. For this reason, we hold that Black's causes of action against Delta for intentional and negligent misrepresentation are not preempted by the ADA.

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[9] TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Supp. 2001).

Because Delta flight supervisor Al Perez's summary judgment claims are based on the same grounds advanced by Delta, including the preemption claims, we find that Black's causes of action against Perez for intentional and negligent misrepresentation are also not preempted by the ADA. Our disposition of the preemption issue against Delta and Perez is similar, except that we must also determine whether travel agencies are covered under the ADA.

Haddad maintains that as a travel agency marketing airline tickets, Black's cause of action against his business for alleged violations of the Texas Deceptive Trade Practices Act is preempted by the ADA for the same reason such a cause of action would not be permitted against an airline.[10] Haddad specifically argues that the ADA preempts claims, "directly related to services provided by an air carrier and those that make reservations for service for an air carrier." We disagree. The ADA provides that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of *any air carrier*." 49 U.S.C. § 41713(b)(1) (1994) (emphasis added). The burden of demonstrating preemption is on the party who asserts it. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Haddad has not demonstrated on appeal, nor in the court below, a

[10] Haddad took no position in his summary judgment motion on the question of whether he was acting as an agent of Delta in issuing the tickets to Black. We therefore are not presented with (and do not address) whether Haddad is entitled to protection from Black's deceptive trade practices cause of action if Haddad is proven to be Delta's agent.

congressional intent to shield travel agencies from state consumer protection laws through the ADA. We agree with Black's assertion that his claims against Haddad involve privately-ordered undertakings that affect the airlines, if at all, in too tenuous, remote, or peripheral a manner to have preemptive effect. *See Morales v. Trans World Airlines,* 504 U.S. at 390. We therefore hold that Black's causes of action against Haddad, including the claimed violation of the Texas Deceptive Trade Practices Act, are not preempted by the ADA.

C. Causation

Summary judgment was also sought on grounds that the damages Black suffered were not caused by any wrongdoing on the part of any appellee. The specific argument made by Delta, Perez, and Haddad in their summary judgment motion in the district court follows:

> The undisputed evidence shows that plaintiff and his wife could have traveled on flight 661, with one passenger in first-class and the other in coach. Even if Mrs. Black was wrongfully denied a seat in first-class, the ultimate result of that alleged wrongdoing is that Mrs. Black would sit in coach for the 2 1/2 hour flight, just like 185 other passengers on this particular Boeing 767. Because the Blacks were not denied transportation on flight 661, alternate flight arrangements were not necessary. . . . At most, the Blacks would have suffered "mental anguish" from the moral, social, or marital humiliation of travel in coach rather than first-class. As the Blacks are probably aware, of course, such a claim would not have a significant legal value.

Put another way, the movants contend that the Blacks were, as a matter of law, required to fly on Flight 661 to avoid having their claim dismissed on grounds of causation. We do not agree. Although the economic damages allegedly suffered by Black when he chartered a private jet to fly him to Las Vegas to ensure his arrival for dinner and the Tom Jones concert were substantial, we cannot say, as a matter of law, that a rational jury could not find that Black suffered at least some damage as a result of the appellee's conduct. "[T]he question of causation (foreseeability) which controls liability should be determined from the facts and circumstances of each particular case, and except where reasonable minds cannot differ, the issue is one for the jury." *Strakos v. Gehring,* 360 S.W.2d 787, 792 (Tex. 1962). We hold that there is at least some evidence that the allegedly improper conduct of the defendants caused Black damages.

D. Avoidable Consequences

Delta, Perez and Haddad, contend that Black could have avoided the damages he allegedly suffered if he had mitigated his damages through other available travel alternatives. As a general rule, whether a party has mitigated his damages is a question of fact reserved to the fact finder at trial. *Walker v. Salt Flat Water Co.,* 128 Tex. 140, 96 S.W.2d 231, 233 (Tex. 1936). Black presented evidence that he could not take a later Delta flight to Las Vegas because his already scheduled post-arrival plans, including pre-purchased tickets to the Tom Jones concert, would not permit a later arrival. He also presented evidence that sitting in coach would conflict with the reason for the trip: a demonstration, through first-class accommodations, of his love for his wife and a desire to

strengthen his weakening marriage. Whether Black could have avoided the expense of a privately chartered jet is an issue we believe is best left to the trier of fact. Appellate courts are particularly ill-equipped to determine, as a matter of law, whether particular actions undertaken to advance interests in "affairs of the heart," such as Black's stated motivation here, are reasonable. Such issues are better left to the trier of fact to resolve. We therefore hold that summary judgment in favor of appellees is not proper under the theory of "avoidable consequences."

E. Agency

Delta and Perez contend that summary judgment was appropriate because Smith Travel was, as a matter of law, not acting as their agent at the time Black purchased his tickets. In other words, Delta and Perez claim that they were not parties to the travel contract made between Black and Smith Travel. We hold that like the issues of causation and avoidable consequences, the agency question presented in this case cannot be resolved as a matter of law.

Delta and Perez moved for summary judgment under this defensive theory based solely on the affidavit of Linda Wilson, a Reservation Sales Supervisor for Delta. In her affidavit, Wilson averred she has been employed in Delta's reservation department for twenty-nine years and that Smith Travel, "like all U.S. travel agencies," is authorized by a separate corporation, the Airline Reporting Corporation ("ARC"), to issue tickets on airlines, but that it does

not act as an agent for Delta.[11] She also avers that the ARC does not authorize travel agents to confirm or accept a reservation on an airline flight and that when requesting reservations on Delta travel agents act exclusively on behalf of the passenger. In response to Wilson's affidavit, Black presented the affidavit of James Hargis, a former Delta passenger service agent with twenty five years' experience. In connection with the question of agency, Hargis directly contradicted Wilson and stated that "when a travel agent issues a ticket, the travel agent acts on behalf of the air carrier, which in this case is Delta." The written disclaimer on the travel documents Black received from the travel agency at the time of ticketing similarly states that Smith Travel & Limousine is acting as an agent for Delta. Under these disputed facts we hold that Delta and Perez have not established, as a matter of law, that Smith Travel & Limousine was not acting as Delta's agent.

F. Ownership of Smith Travel & Limousine

Haddad moved for summary judgment on the additional ground that he was not the owner of Smith Travel &

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[11] An agent is one who consents to act on behalf of, and subject to, the control of the principal, who has manifested consent that the agent so act. *Hand v. Dean Witter Reynolds, Inc.*, 889 S.W.2d 483, 493 (Tex. App. – Houston [14th Dist.] 1994, writ denied). Each side tendered summary judgment affidavits which purported to establish whether Haddad was Delta's agent. To the extent that each respective affidavit, in addition to providing facts pertinent to that issue, addressed the ultimate question of whether an agency relationship existed, the affidavits were improper. *See Watkins v. Hammerman & Gainer,* 814 S.W.2d 867, 870 (Tex. App. – Austin 1991, no writ).

Limousine on June 23, 1995. In support of that claim, Haddad signed an affidavit in which he averred that on April 1, 1995, he sold Smith Travel & Limousine to a corporation, Around the Glop, Inc. A written purchase agreement documenting the sale was attached to his affidavit. In response, Black produced a certified record from the Dallas County Clerk's Office certifying Abe Haddad began doing business as "Smith Travel & Limousine," on June 10, 1991, and that he was still on record in that same capacity as of August 22, 1997. Black also tendered an affidavit certified by the office of the Texas Secretary of State indicating that there was no record of entry indicating any assumed names certificates on file for the corporation known as Around the Glop, Inc. We hold that because of this conflicting evidence, that it was not established, as a matter of law, that Abe Haddad was not doing business as Smith Travel & Limousine on the date Black purchased his airline tickets.

Having determined that summary judgment was not proper on any of the grounds advanced by appellees in the district court, we sustain issues one and two. Given our disposition of those issues, it is not necessary that we address the remaining issues advanced by Black on appeal. We reverse the district court's orders granting summary judgment and remand the case for trial.

DAVID L. RICHARDS
Justice

Before Justice Vance,
Justice Gray, and
Justice Richards (Sitting by Assignment)
(Justice Gray concurring)
Reversed and Remanded
Opinion delivered and filed January 30, 2002

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CONCURRING OPINION

This case is being reversed and remanded. With that I agree. But the only issue which we needed to decide to reach that result is the question of whether Haddad is the agent for Delta. Black presented some evidence that Haddad is the agent of Delta. Accordingly the motions for summary judgment of Delta and Perez must be reversed for a determination of that issue. Haddad's motion must also be reversed because of the same issue and for the additional reason that Black introduced some evidence from which it could be inferred that Haddad was the owner of the unincorporated travel agency at the time that Black purchased the tickets.

Once the issue of agency is determined on remand, many of the other issues purportedly decided in this opinion will be advisory opinions because they will no longer be necessary to a disposition of this case. The answer to the agency question will control the causes of action that Black can assert and against whom, the nature of the damages that can be recovered (tort versus contract[1] – general versus special[2]), what evidence can be considered against which defendants, and a multitude of other "ripple

[1] *See Weber v. Domel*, 2001 Tex. App. LEXIS 3589 (Tex. App. – Waco 2001, no pet. h.).

[2] *See Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145, 5 Eng. Rul. Cas. 502 (1854).

effects" in the manner in which some of the issues presented in this appeal should ultimately be decided.

The majority gets trapped into attempting to resolve many of these issues prematurely because this is a very complex area of the law and the parties have failed to appreciate the conflicts in the various arguments they have made in their briefs. This problem is compounded because the briefs of the parties have failed to clearly present what allegations were made in the alternative and the consequences of "proving" one alternative or the other. On these briefs, and because on remand there may be additional factual development that would assist us, I would not attempt to decide whether Black's claims for intentional misrepresentation (fraud) and negligent misrepresentation are preempted by the Airline Deregulation Act.

Finally, because I believe any decision regarding the preemption issue to be premature, I express only my reservations about the majority's conclusion that the torts of fraud and negligent misrepresentation are more similar to breach of contract claims than they are to consumer protection statutes and therefore are not covered by the Airline Deregulation Act's preemption of efforts by the various states to regulate the airline industry.

With these comments, I concur in the judgment.

TOM GRAY
Justice

Concurring opinion delivered and filed on January 30, 2002
Do not publish

Cause No. 96-6320

ROBERT C. BLACK, Plaintiff, vs. DELTA AIRLINES, INC. AL PEREZ, ABE HADDAD D/B/A SMITH TRAVEL & LIMOUSINE, AND MELISSA SHINN, Defendants.	§ § § § § § § § § § §	IN THE DISTRICT COURT DALLAS COUNTY, TEXAS 192nd JUDICIAL DISTRICT

ORDER GRANTING DEFENDANTS DELTA AIR LINES, INC. AND AL PEREZ'S MOTION FOR SUMMARY JUDGMENT

(Filed Jan. 9, 1998)

On the 24th day of November, 1997, came on to be considered Defendant DELTA AIR LINES, INC.'s and Defendant AL PEREZ's *Motion for Summary Judgment* in the above-styled and -numbered case. After due consideration, the Court finds that there is no material issue of fact with respect to plaintiff's claims against Delta Air Lines, Inc. and Al Perez and that judgment should be entered in favor of these defendants as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment filed by Delta Air Lines, Inc. and Al Perez is hereby granted in its entirety and that all claims and causes of action against Delta Air Lines, Inc. and Al Perez are dismissed with prejudice to the refiling of same.

IT IS FURTHER ORDERED that Robert Black shall pay Delta Air Lines, Inc. and Al Perez costs of court.

SIGNED this 5 day of January, 1998

/s/ Ted M. Akin

JUDGE PRESIDING

Former JUDGE Court of Appeals JUDICIAL DISTRICT COURT SITTING FOR JUDGE 192nd JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

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49 U.S.C.A. § 41713. Preemption of authority over prices, routes, and service

(a) **Definition.** – In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) **Preemption.** – (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) **Transportation by air carrier or carrier affiliated with a direct air carrier.** –

(A) **General rule.** – Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier

through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) **Matters not covered.** – Subparagraph (A) –

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) **Applicability of paragraph (1).** – This paragraph shall not limit the applicability of paragraph (1).

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14 C.F.R. § 250.1 Definitions.

"Airport" means the airport at which the direct or connecting flight, on which the passenger holds confirmed reserved space, is planned to arrive or some other airport serving the same metropolitan area, provided that transportation to the other airport is accepted (i.e., used) by the passenger.

"Carrier" means (a) a direct air carrier, except a helicopter operator, holding a certificate issued by the Board pursuant to sections 401(d)(1), 401(d)(2), 401(d)(5) and 401(d)(8) of the Act, or an exemption from section

401(a) of the Act, authorizing the transportation of persons, or (b) a foreign route air carrier holding a permit issued by the Board pursuant to section 402 of the Act, or an exemption from section 402 of the Act, authorizing the scheduled foreign air transportation or persons.

"Comparable air transportation" means transportation provided to passengers at no extra cost by a carrier as defined above.

"Confirmed reserved space", means space on a specific date and on a specific flight and class of service of a carrier which has been requested by a passenger and which the carrier or its agent has verified, by appropriate notation on the ticket or in any other manner provided therefor by the carrier, as being reserved for the accommodation of the passenger.

"Large aircraft" means any aircraft that has a passenger capacity of more than 60 seats.

"Stopover" means a deliberate interruption of a journey by the passenger, scheduled to exceed 4 hours, at a point between the place of departure and the final destination.

"Sum of the values of the remaining flight coupons" means the sum of the applicable one-way fares, including any surcharges and air transportation taxes, less any applicable discounts.

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14 C.F.R. § 250.2 Applicability.

This part applies to every carrier, as defined in § 250.1, with respect to flight segments with large aircraft

in (1) interstate or overseas air transportation and (2) foreign air transportation originating at a point within the United States.

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14 C.F.R. § 250.2a Policy regarding denied boarding.

In the event of an oversold flight, every carrier shall ensure that the smallest practicable number of persons holding confirmed reserved space on that flight are denied boarding involuntarily.

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14 C.F.R. § 250.2b Carriers to request volunteers for denied boarding.

(a) In the event of an oversold flight, every carrier shall request volunteers for denied boarding before using any other boarding priority. A "volunteer" is a person who responds to the carrier's request for volunteers and who willingly accepts the carriers' offer of compensation, in any amount, in exchange for relinquishing the confirmed reserved space. Any other passenger denied boarding is considered for purposes of this part to have been denied boarding involuntarily, even if that passenger accepts the denied boarding compensation.

(b) If an insufficient number of volunteers come forward, the carrier may deny boarding to other passengers in accordance with its boarding priority rules. However, the carrier may not deny boarding to any passenger involuntarily who was earlier asked to volunteer without having been informed about the danger of being denied

boarding involuntarily and the amount of Board-mandated compensation.

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14 C.F.R. § 250.3 Boarding priority rules.

(a) Every carrier shall establish priority rules and criteria for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight in the event that an insufficient number of volunteers come forward. Such rules and criteria shall reflect the obligations of the carrier set forth in §§ 250.2a and 250.2b to minimize involuntary denied boarding and to request volunteers, and shall be written in such manner as to be understandable and meaningful to the average passenger. Such rules and criteria shall not make, give, or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust or unreasonable prejudice or disadvantage in any respect whatsoever.

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14 C.F.R. § 250.4 [Reserved]

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14 C.F.R. § 250.5 Amount of denied boarding compensation for passengers denied boarding involuntarily.

(a) Subject to the exceptions provided in § 250.6, a carrier as defined in § 250.1, shall pay compensation to passengers denied boarding involuntarily from an oversold flight at the rate of 200 percent of the sum of the values of the passenger's remaining flight coupons up to the passenger's next stopover, or if none, to the passenger's final

destination, with a maximum of $400. However, the compensation shall be one-half the amount described above, with a $200 maximum, if the carrier arranges for comparable air transportation, or other transportation used by the passenger that, at the time either such arrangement is made, is planned to arrive at the airport of the passenger's next stopover or if none, at the airport of the passenger's destination, not later than 2 hours after the time the direct or connecting flight on which confirmed space is held is planned to arrive in the case of interstate air transportation, or 4 hours after such time in the case of foreign air transportation.

(b) Carriers may offer free or reduced rate air transportation in lieu of the cash due under paragraph (a) of this section, if (1) the value of the transportation benefit offered is equal to or greater than the cash payment otherwise required, and (2) the carrier informs the passenger of the amount of cash compensation that would otherwise be due and that the passenger may decline the transportation benefit and receive the cash payment.

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14 C.F.R. § 250.6 Exceptions to eligibility for denied boarding compensation.

A passenger denied boarding involuntarily from an oversold flight shall not be eligible for denied boarding compensation if:

(a) The passenger does not comply fully with the carrier's contract of carriage or tariff provisions regarding ticketing, reconfirmation, check-in, and acceptability for transportation;

(b) The flight for which the passenger holds confirmed reserved space is unable to accommodate that passenger because of substitution of equipment of lesser capacity when required by operational or safety reasons;

(c) The passenger is offered accommodations or is seated in a section of the aircraft other than that specified on the ticket at no extra charge, except that a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund; or

(d) The carrier arranges comparable air transportation, or other transportation used by the passenger at no extra cost to the passenger, that at the time such arrangements are made is planned to arrive at the airport of the passenger's next stopover or, if none, at the airport of the final destination not later than 1 hour after the planned arrival time of the passenger's original flight or flights.

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14 C.F.R. § 250.7 [Reserved]

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14 C.F.R. § 250.8 Denied boarding compensation.

(a) Every carrier shall tender to a passenger eligible for denied boarding compensation, on the day and place the denied boarding occurs, except as provided in paragraph (b), cash or an immediately negotiable check for the appropriate amount of compensation provided in § 250.5.

(b) Where a carrier arranges, for the passenger's convenience, alternate means of transportation that departs before the payment can be prepared and given to the passenger, tender shall be made by mail or other means within 24 hours after the time the denied boarding occurs.

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14 C.F.R. § 250.9 Written explanation of denied boarding compensation and boarding priorities.

(a) Every carrier shall furnish passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space immediately after the denied boarding occurs, a written statement explaining the terms, conditions, and limitations of denied boarding compensation, and describing the carriers' boarding priority rules and criteria. The carrier shall also furnish the statement to any person upon request at all airport ticket selling positions which are in the charge of a person employed exclusively by the carrier, or by it jointly with another person or persons, and at all boarding locations being used by the carrier.

(b) The statement shall read as follows:

COMPENSATION FOR DENIED BOARDING

If you have been denied a reserved seat on (name of air carrier), you are probably entitled to monetary compensation. This notice explains the airline's obligation and the passenger's rights in the case of an oversold flight, in accordance with regulations of the U.S. Civil Aeronautics Board.

VOLUNTEERS AND BOARDING PRIORITIES

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his or her will until airline personnel first ask for volunteers who will give up their reservation willingly, in exchange for a payment of the airline's choosing. If there are not enough volunteers, other passengers may be denied boarding involuntarily in accordance with the following boarding priority of (name of air carrier): (In this space carrier inserts its boarding priority rules or a summary thereof, in a manner to be understandable to the average passenger.)

COMPENSATION OF INVOLUNTARY DENIED BOARDING

If you are denied boarding involuntarily, you are entitled to a payment of "denied boarding compensation" from the airline unless:

(1) You have not fully complied with the airline's ticketing, check-in, and reconfirmation requirements, or you are not acceptable for transportation under the airline's usual rules and practices, or (2) you are denied boarding because the flight is canceled; or (3) you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons; or (4) you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or (5) the airline is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

AMOUNT OF DENIED BOARDING COMPENSATION

Passengers who are eligible for denied boarding compensation must be offered a payment equal to the sum of the face values of their ticket coupons, with a $200 maximum. However, if the airline cannot arrange "alternate transportation" (see below) for the passenger, the compensation is doubled ($400 maximum). The "value" of a ticket coupon is the one-way fare for the flight shown on the coupon including any surcharge and air transportation tax, minus any applicable discount. All flight coupons, including connecting flights, to the passenger's final destination or first 4-hour stopover are used to compute the compensation.

"Alternate transportation" is air transportation (by an airline licensed by CAB) or other transportation used by the passenger which, at the time the arrangement is made, is planned to arrive at the passenger's next scheduled stopover (of 4 hours or longer) or final destination no later than 2 hours (for flights within U.S. points, including territories and possessions) or 4 hours (for international flights) after the passenger's originally scheduled arrival time.

METHOD OF PAYMENT

The airline must give each passenger who qualifies for denied boarding compensation a payment by cash or check for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the airline arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. The air carrier may offer free tickets in place of the cash

payment. The passenger may, however, insist on the cash payment, or refuse all compensation and bring private legal action.

PASSENGER'S OPTIONS

Acceptance of the compensation may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

(Approved by the Office of Management and Budget under control number 3024-0003)

(Authority: Sec. 204 of the Federal Aviation Act of 1958, as amended, 72 Stat. 743; 49 U.S.C. 1324).

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14 C.F.R. § 250.10 Report of passengers denied confirmed space.

Every carrier shall file, on a quarterly basis, the information specified in BTS Form 251. The reporting basis shall be flights originating or terminating at, or servicing, a point within the United States. The reports are to be submitted within 30 days after the quarter covered by the report. The calendar quarters end March 31, June 30, September 30 and December 31. "Total Boardings" on line 7 of Form 251 shall include only passengers on flights for which confirmed reservations are offered. No reports need be filed for inbound international flights on which the protections of this part do not apply.

(Approved by the Office of Management and Budget under control number 2138-0018)

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14 C.F.R. § 250.11 Public disclosure of deliberate overbooking and boarding procedures.

(a) Every carrier shall cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in the charge of a person employed exclusively by it, or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers, a sign located so as to be clearly visible and clearly readable to the traveling public, which shall have printed thereon the following statement in boldface type at least one-fourth of an inch high:

NOTICE – OVERBOOKING OF FLIGHTS

Airline flights may be overbooked, and there is a slight chance that a seat will not be available on a flight for which a person has a confirmed reservation. If the flight is overbooked, no one will be denied a seat until airline personnel first ask for volunteers willing to give up their reservation in exchange for a payment of the airline's choosing. If there are not enough volunteers the airline will deny boarding to other persons in accordance with its particular boarding priority. With few exceptions persons denied boarding involuntarily are entitled to compensation. The complete rules for the payment of compensation and each airline's boarding priorities are available at all airport ticket counters and boarding locations. Some airlines do not apply these consumer protections to travel from some foreign countries, although other consumer

protections may be available. Check with your airline or your travel agent.

(b) Every carrier shall include with each ticket sold in the United States the notices set forth in paragraph (a) of this section, printed in at least 12-point type. The notice may be printed on a separate piece of paper, on the ticket stock, or on the ticket envelope. The last two sentences of the notice shall be printed in a type face contrasting with that of the rest of the notice.

(c) It shall be the responsibility of each carrier to ensure that travel agents authorized to sell air transportation for that carrier comply with the notice provisions of paragraphs (a) and (b) of this section.

(d) [Reserved]

(e) Any air carrier or foreign air carrier engaged in foreign air transportation that complies fully with this part for inbound traffic to the United States need not use the last two sentences of the notices required by paragraph (a) of this subsection.

(Approved by the Office of Management and Budget under control number 3024-0018)

(Authority: Sec. 204 of the Federal Aviation Act of 1958, as amended, 72 Stat. 743; 49 U.S.C. 1324).

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14 C.F.R. PART 253 – NOTICE OF TERMS OF CONTRACT OF CARRIAGE

§ 253.1 Purpose.

The purpose of this rule is to set uniform disclosure requirements, which preempt any State requirements on

the same subject, for terms incorporated by reference into contracts of carriage for scheduled service in interstate and overseas passenger air transportation.

§ 253.2 Applicability.

This rule applies to all scheduled direct air carrier operations in interstate and overseas air transportation. It applies to all contracts with passengers, for those operations, that incorporate terms by reference.

§ 253.3 Definitions.

Large aircraft means any aircraft designed to have a maximum passenger capacity of more than 60 seats.

Passenger means any person who purchases, or who contacts a ticket office or travel agent for the purpose of purchasing, or considering the purchase of, air transportation.

Ticket office means station, office, or other location where tickets are sold that is under the charge of a person employed exclusively by the carrier, or by it jointly with another person.

§ 253.4 Incorporation by reference in the contract of carriage.

(a) A ticket or other written instrument that embodies the contract of carriage may incorporate contract terms by reference (i.e., without stating their full text), and if it does so shall contain or be accompanied by notice to the passenger as required by this part. In addition to other remedies at law, an air carrier may not claim the benefit

as against the passenger of, and the passenger shall not be bound by, any contract term incorporated by reference if notice of the term has not been provided to that passenger in accordance with this part.

(b) Each air carrier shall make the full text of each term that it incorporates by reference in a contract of carriage available for public inspection at each of its airport and city ticket offices.

(c) Each air carrier shall provide free of charge by mail or other delivery service to passengers, upon their request, a copy of the full text of its terms incorporated by reference in the contract. Each carrier shall keep available at all times, free of charge, at all locations where its tickets are sold within the United States information sufficient to enable passengers to order the full text of such terms.

(The notice requirements contained in paragraphs (b) and (c) were approved by the Office of Management and Budget under control number 3024-0061)

§ 253.5 Notice of incorporated terms.

Except as provided in § 253.8, each air carrier shall include on or with a ticket, or other written instrument given to a passenger, that embodies the contract of carriage and incorporates terms by reference in that contract, a conspicuous notice that:

(a) Any terms incorporated by reference are part of the contract, passengers may inspect the full text of each term incorporated by reference at the carrier's airport or city ticket offices, and passengers have the right, upon request at any location where the carrier's tickets are sold

within the United States, to receive free of charge by mail or other delivery service the full text of each such incorporated term;

(b) The incorporated terms may include and passengers may obtain from any location where the carrier's tickets are sold within the United States further information concerning:

(1) Limits on the air carrier's liability for personal injury or death of passengers, and for loss, damage, or delay of goods and baggage, including fragile or perishable goods;

(2) Claim restrictions, including time periods within which passengers must file a claim or bring an action against the carrier for its acts or omissions or those of its agents;

(3) Rights of the carrier to change terms of the contract. (Rights to change the price, however, are governed by § 253.7);

(4) Rules about reconfirmation of reservations, check-in times, and refusal to carry;

(5) Rights of the carrier and limitations concerning delay or failure to perform service, including schedule changes, substitution of alternate air carrier or aircraft, and rerouting.

(Approved by the Office of Management and Budget under control number 3024-0061)

§ 253.6 Explanation of incorporated terms.

Each air carrier shall ensure that any passenger can obtain from any location where its tickets are sold within the United States a concise and immediate explanation of any terms incorporated by reference, concerning the subjects listed in § 253.5(b).

(Approved by the Office of Management and Budget under control number 3024-0061)

§ 253.7 Direct notice of certain terms.

A passenger shall not be bound by any terms restricting refunds of the ticket price, imposing monetary penalties on passengers, or permitting the carrier to raise the price, unless the passenger receives conspicuous written notice of the salient features of those terms on or with the ticket.

(Approved by the Office of Management and Budget under control number 3024-0061)

§ 253.8 Qualifications to notice requirements.

(a) If notice is not provided in accordance with § 253.5 at a ticket sales location outside of the United States that is not a U.S. air carrier ticket office, the price paid for the portion of such ticket that is for interstate and overseas air transportation shall be refundable without penalty if the passenger refuses transportation by the carrier. Each air carrier shall ensure that passengers who have bought tickets at those locations without the notice required in § 253.5 are given that notice not later than

check-in for the travel in interstate or overseas air transportation, and that conspicuous notice is included on or with the ticket stating that the price for that travel is refundable without penalty.

(b) An air taxi operator (including a commuter air carrier) not operating under Subpart I of Part 298 of this chapter shall not be considered to have incorporated terms by reference into its contract of carriage merely because a passenger has purchased a flight segment on that carrier that appears on ticket stock that contains a statement that terms have been incorporated by reference. However, such an air taxi operator may not claim the benefit as against the passenger of, and the passenger shall not be bound by, any contract term incorporated by reference if notice of the term has not been provided to the passenger in accordance with this part.